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CURRENT EVENTS.

JUDICIAL LEGISLATION—CONTRIBUTORY NEGLIGENCE.—It is the function of courts to expound the law, to declare what it is, and to apply its principles to issues clearly formed by appropriate pleadings in prescribed forms, supported by legal testimony given and received under well settled rules of evidence. This is all elementary and rudimental, and it cannot be gainsaid that it includes all the powers and duties which appertain to courts of law or equity. There is no tincture of legislative power in the functions of courts, derived either from common, constitutional or statutory law, and yet there must be a certain apparent exercise of such powers in the necessary expansion or limitation of legal principles by judicial construction. This, however, is more apparent than real, and is not only salutary but necessary. In the law, as in everything else of merely human origin, there are ambiguities, discrepancies, contradictions, to reconcile which and to apply the net results to the practical purposes of justice is the duty of the courts. In doing this there is no departure from legal principles, there is no legislation, the court merely declares what the law is, and this it is their duty to do.

When, however, courts go further and declare, not what the law is, but what it *shall* be, we submit with great diffidence that they overstep their province and assume legislative powers, which are conferred upon them by no law or constitutional provision.

On most subjects the courts are content to take the law as they find it and to administer it as best they can. On a few subjects a spirit of innovation, if we may be permitted to say so, seems to possess the bench, producing an interminable series of presumptions, inferences, distinctions, differences, explanations, increasing greatly the uncertainty in the application of the law and, consequently, adding enormously to the volume of litigation. The chief of these subjects which have by judicial construction outgrown all reasonable limits is the law of negligence, and of its correlative, contributory negligence.

The rapidity with which litigation on these subjects has grown and the dimensions to which it has attained are amazing. Almost, if not quite within living memory, all or nearly all the law on these topics, recognized in the courts, could be expressed in single sentences. Now, it requires thousands of adjudged cases, hundreds of volumes of reports and scores of treatises to imperfectly express the modifications made by the courts of two simple propositions, viz: He who is injured in person or property by the negligence of another may recover damages therefor. But he shall not, if the injury was caused wholly or in part by his own negligence.

The volume of litigation on these subjects is, no doubt, greatly increased by the immense growth of business and mechanical and manufacturing industry of the last half century, but making due allowance for that, the fact remains that very much of it is due to the uncertain and unsettled state of the law. Indeed, this condition of the law and the volume of litigation are reciprocally reproductive. Each new case forms a new precedent and adds to the uncertainty, and that uncertainty encourages parties to bring their actions and take their chances. Counsel applied to by such parties can find authorities in abundance in favor of their clients, as well as against them, and cannot divine whether the courts of their State will follow the rulings on one side or the other. The result is, of course, that another "damage suit" is added to the vast number of such actions pending in the courts.

It is noteworthy, however, that the tendency of judicial construction is now decidedly against the plaintiffs in such actions. Almost anything is now held to be contributory negligence, and it might be expected that an end would be put to this style of litigation by the impossibilty of recovering a judgment in such an action, and that the successful plaintiff in the damage suit of the future, must needs be "a faultless monster that the world ne'r saw." But "hope springs eter-

nal in the human breast," and as long as one chance in a hundred remains, every plaintiff, in the usual frame of mind of plaintiffs on such occasions, would confidently expect to be the lucky one.

There ought to be a remedy for the unsatisfactory condition of the law on this subject. We can think of but one remedy and that is trenchant and conclusive legislation. Better than the present state of affairs it would be, to abolish all civil liability for negligence; let every man who enters a machine shop or a factory or other place of dangerous employment know that he takes his life in his hand, let him get an increase of his wages, *if he can*, and devote the advance to an insurance of life and limb against the perils of his employment; and let him who would travel by rail or steamboat do, as his ancestors did when they embarked on a sea voyage, make his will and ask the prayers of the church for his safe return. Or else, what would be better still, the statute should make the liability for negligence absolute, hold all men and all corporations to strict responsibility for their acts or negligences, and for those of their servants, and trust to the instinct of self-preservation to protect employers against bankruptcy. We do firmly believe that there are very few men who would kill or maim themselves, if they could possibly help it, for the honor and glory and profit of figuring perself or personal representative as plaintiffs in damage suits against corporations, howsoever bloated they may be. The last and worst expedient would be to leave the law as it stands, or is supposed to stand, except that evidence of contributory negligence should be admissible only in mitigation of damages. Either of these suggested statutes, especially the second, would, in our judgment, be a vast improvement upon the present law relating to negligence and contributory negligence.

NOTES OF RECENT DECISIONS.

INSANITY—TEST OF CRIMINAL RESPONSIBILITY.—In a recent case,[1] the Supreme Court of Alabama has taken what strikes us as a new departure in the legal view of insanity and the test of criminal responsibility of persons accused of crime in whose behalf the defense of insanity is set up. The views of that court on the subject have been for some years entertained in medical circles, but so far as we have observed have heretofore met with very slight recognition by courts or legal writers.

The received legal doctrine which this case controverts, is, that the test of insanity as controlling responsibility for criminal acts is the capacity to distinguish between right and wrong. This rule was laid down after great deliberation in the House of Lords in 1843, in McNaghten's case,[2] and has been followed very generally by American courts. In the case under consideration the court holds that the test established in the McNaghten case is imperfect and fallacious and in effect no test at all; and, further, that there cannot be any single test in questions of this description.

The opinion of the Supreme Court of Alabama in this case is quite a long one, but its substance is condensed in the syllabus prepared by the court which is as follows:

"The capacity to distinguish between right and wrong, either abstractly or as applied to the particular act, as a legal *test* of responsibility for crime, is repudiated by the modern and more advanced authorities, legal and medical, who lay down the following rules which the court now adopts: (1) Where there is no such capacity to distinguish between right and wrong, as applied to the particular act, there is no legal responsibility; (2) where there is such capacity, a defendant is nevertheless not legally responsible if, by reason of the *duress* of mental disease, he has so far lost the *power to choose* between right and wrong as not to avoid doing the act in question, so that his free agency was at the time destroyed; *and*, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product or offspring of it *solely*. The same rule applies to delusional insanity, and necessarily conflicts

[1] Parsons v. State, S. C. Ala., July 28, 1887; 2 South. Rep. 854.

[2] 10 Clark & F. 200.

with the old rule laid down by the English judges in McNaghten's case, 10 Clark & F. 200, that, in cases of delusion, the defendant 'must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.' (The fourth head-note in Boswell's case, 63 Ala. 308, on this point, pronounced *obiter dictum*.) The existence, or non-existence of the disease of insanity, such as may fall within the above rule, is a question of fact to be determined in each particular case by the jury, enlightened, if necessary, by the testimony of experts."

The court sustains its views in a very able opinion, which, if it should fail to convince, will at least induce a very serious and thorough consideration of the subject.

THE EVASION OF EXEMPTION LAWS IN FOREIGN JURISDICTIONS.

1. Residence of Garnishee.
2. Statutes Liberally Construed.
3. Resident Creditors—Non-resident Debtors.
4. Non-resident Creditors and Debtors.
5. Remedy by Injunction.
6. Damages for Disobeying Injunction.
7. Remedy by Subsequent Action Against the Creditor.
8. Subsequent Action Against the Garnishee.

The growing practice of sending claims to be collected by garnishment in foreign jurisdictions in evasion of the exemption laws of the common residence of creditor and debtor, particularly where the garnishee is a railroad corporation doing business in both States, is a sufficient excuse for devoting some attention to the subject in general.

1. *Residence of Garnishee.*—Process of garnishment served upon a non-resident, but temporarily within the State, whether a natural person or corporation by its representative, is not effectual, unless the garnishee has money or property of the principal debtor actually within the State, or owes him money to be paid therein.[1] But service of process upon a resident garnishee is binding, although it is a corporation and is also a resident of another State where the principal debtor resides.[2] Even where, by the terms of its contract with its employee, a railroad corporation bound itself to pay him in Chicago, *and not elsewhere*, it was held liable to his creditor, in garnishment proceedings in Wisconsin.[3]

2. *Statutes Liberally Construed.*—Unless such clearly appears to have been the intention of the legislature, the courts will not construe a statute exempting property from attachment or execution as applying only to residents of the State, but will extend the relief to all alike.[4] In a case in Maine,[5] where a resident had attached the property of a non-resident, the court said: "If a citizen of this State attempts to secure the payment of his debt or claim against a foreigner temporarily within our jurisdiction by availing himself of the provisions of our laws authorizing a suit and attachment of the debtor's property, he cannot claim any greater rights or cause the precept to be executed in any different manner than when it is against a citizen of Maine."

I a recent Nebraska[6] case, Maxwell, C. J., delivering the opinion of the court said: "While the exemption laws of a State have no extra-territorial effect, yet they should be so construed as to give them effect. * * * Here the purpose of the act was to exempt sixty days' wages of the head of a family. The statute is based upon the presumption that the family of a person in the employ of another is usually dependent on such person for support. It can make no difference, therefore, where the family or the head of

[1] Roche v. R. I. Ins. Assn., 2 Ill. App. (Bradw.) 360; Tingley v. Bateman, 10 Mass. 343; Sawyer v. Thompson, 4 Fost. (N. H.) 510; Wright v. C. B. & Q. R. Co., 19 Neb. 175; Bates v. N. O. J. & G. N. R. Co., 4 Abb. Pr. 72; s. c., 13 How. Pr. 516; Baylies v. Houghton, 15 Vt. 626; 2 Wade on Attachment, §§ 343, 413. As to service on non-resident corporation, see 2 Wade on Attachment, §§ 359, 391.

[2] B. & M. R. Co. v. Thompson, 31 Kan. 180; s. c., 18 Cent. L. J. 192; s. c., 47 Am. Rep. 497; s. c., 16 Am. & Eng. R. R. Cas. 480.

[3] Commercial Nat. Bank of Chicago v. C. M. & St. P. R. Co., 45 Wis. 172.

[4] Mineral Point R. Co. v. Barron, 83 Ill. 365; M. P. R. Co. v. Maltby, 34 Kan. 125; s. c., 23 Cent. L. J. 154; K. C. St. J. & C. B. R. Co. v. Gough, 35 Kan. 1; s. c., 10 Pac. Rep. 89; Hill v. Loomis, 6 N. H. 263; Sproul v. McCoy, 26 Ohio St. 577; Haskill v. Andros, 4 Vt. 609; Lowe v. Stringdam, 14 Wis. 222. Even where the property is not exempt at the debtor's domicile: Newell v. Hayden, 8 Ia. 140.

[5] Everett v. Herrin, 46 Me. 357.

[6] Wright v. C. B. & Q. R. Co., 19 Neb. 175; s. c., 27 N. W. Rep. 90.

the family resides, as such wages must be applied to the purpose for which they were intended—the support of the family—or suffering would be the result. It certainly would be a very narrow view of the law to limit its beneficent provisions to residents of the State." It can make no difference in the application of this rule that statutes giving exemptions are to be liberally construed, whether the attaching or execution creditor is a resident or non-resident.

Even where exemption laws have been limited in their benefits to residents of the State, they have been construed liberally, within the prescribed limits, to protect persons about to become non-residents,[7] and to include as residents those who have just come within the State and have not yet established a home.[8]

3. *Resident Creditors — Non-resident Debtors.*—It is generally held that exemption laws affect the remedy and not the right, and can only have such extra-territorial effect as may be recognized upon principles of interstate comity. Where it is the plain intention of the legislature to restrict the benefits of such laws to residents of the State, the court will not, as against resident creditors, enforce the exemption laws of the principal debtor's domicil, though the garnishee is a railroad or other corporation resident in both jurisdictions.

In an important case in Kansas,[9] the supreme court stated the law as follows: "Coming into this State to transact business, he (the garnishee) must abide by the exemption laws of this State, and when a party, who for aught that appears is a citizen of this State, invokes the process of our courts and the rules of our statutes to secure the payment of a just debt, a garnishee may not reply, that, by the laws of the State where he resides and where his employee also resides, his debt to such employee is exempt from all garnishee process."

We are inclined to believe that the same rule should obtain when the attaching or execution creditor is a resident of a third State; for he can be under no greater legal or moral obligation to respect the laws of his debtor's domicil than a resident of the State where the suit is brought.

4. *Non-resident Creditors and Debtors.*—When the attaching or execution creditor and his debtor, or all three parties, are residents of the same State and the proceedings are instituted in the foreign jurisdiction to evade the exemption laws of their domicil, the question is not free from difficulties. In an Iowa case[10] the principal debtor and his creditor were residents of Nebraska and the garnishee, a railroad corporation of both States. The court said: "It is insisted that this action was instituted by the plaintiff in the court below with the fraudulent purpose of preventing the defendant from pleading the exemption laws of the State of Nebraska or of this State and to defraud and cheat them out of the exemptions he is entitled to under the laws of Nebraska. * * *

There can be no doubt that there is an absolute right in a non-resident of this State to institute and maintain actions in our courts. We have held that if a person residing in our jurisdiction be induced under false pretenses or representations to come into another for the purpose of there getting service upon him, the jurisdiction thus acquired will be held to have been fraudulently obtained and the judgment will be void. * * *

In the case at bar the plaintiff was guilty of no actual fraud. He used no unlawful means to acquire jurisdiction of the parties or subject matter and while the proceeding operates as a hardship on the defendant we cannot say that jurisdiction was obtained by fraud or by resort to any unlawful means." All exemptions were denied him. This doctrine is well established in Iowa.[11]

In New Jersey the attachment of exempt personal property of a non-resident by a resident of the same State is prohibited by statute; but this statute has been construed not to include "rights and credits" which may be garnished by creditors from the state of the principal debtor.[12]

[7] Wood v. Bresnahan, 30 N. E. Rep. 206; s. c., 59 Mich. ——.

[8] People v. McClay, 2 Neb. 7; Chesney v. Francisco, 12 Neb. 626. "Every citizen" means every inhabitant: Cobbs v. Coleman, 14 Tex. 594. See also, Bonnel v. Dunn, 28 N. J. L. 153; Allen v. Manasse, 4 Ala. 554.

[9] B. & M. R. Co. v. Thompson, *supra*. See also, Boykin v. Edwards, 21 Ala. 261.

[10] Mooney v. U. P. R. Co., 60 Ia. 346.

[11] Leiber v. U. P. R. Co., 49 Ia. 688; Oberfelder v. U. P. R. Co., 60 Ia. 755; s. c., 14 N. W. Rep. 255; Broadstreet v. Clark, 65 Ia. 677; s. c., 22 N. W. Rep. 919.

[12] Leonard v. Lawrence, 32 N. J. L. 355.

In a case in Illinois,[13] where both attaching creditor and his debtor were residents of Wisconsin and the garnishee a railroad corporation of both States, the court refused to allow the exemptions provided by the Wisconsin statute, but allowed those given by the the laws of Illinois.

In a Wisconsin case,[14] both principal debtor and creditor being residents of Illinois and the garnishee a railroad corporation of both States, the court held that the benefits of the Wisconsin exemption laws could be claimed by residents of the State only and refused to consider the question whether the debtor would be entitled to any exemption under the Illinois statute, he not having claimed any as a citizen of the latter State.

These cases would seem to indicate that a debtor, whose credits are garnished or property attached in another State where the exemption laws are not broad enough to include non-residents, can expect no protection in the foreign court even as against a resident of his own State who is palpably evading the exemption laws of their domicil. This doctrine not only involves many hardships, but seems to be a needless limitation of inter-state comity. While a State might well refuse to enforce the exemption laws of another State as against its own citizens or the citizens of a third State, it would seem just and proper to enforce them against a creditor from the same State who is in a degree at least morally responsible for their existence.

In a recent case in Kansas,[15] the court held: "In a proceeding in garnishment where the parties are non-residents of the State of Kansas and are residents of the State of Missouri and the thing attempted to be attached by the garnishment proceedings is a debt created and payable in the State of Missouri, but the garnishee does business in Kansas and is liable to be garnished in this State and the other parties come temporarily into Kansas and while in Kansas the plaintiff who is a creditor of the defendant who is a creditor of the garnishee commences an action in Kansas against the defendant and serves a garnishment summons upon the garnishee and the debt of garnishee to the defendant is by the laws of the State of Missouri exempt from garnishment process and such debt also seems to come within the exemption provision contained in section 490 of the Civil Code of Kansas and section 157 of the Justice Code of Kansas exempting certain earnings of the debtor from the enforced payment of his debts, such debt is exempt from garnisment process in Kansas." The fact that the principal debtor might claim the property as exempt under the laws of Kansas, makes this case useful in this connection only as indicating the drift of opinion.

A head-note to a recent Nebraska case,[16] reads as follows: "Where a debt was contracted in Iowa, the parties residing there, and a creditor of the debtor not subject to garnishment in that State, the exemption will continue in this State in case an action is brought on the claim." Here again the principal debtor claimed the debt as exempt under the laws of Nebraska under which in fact the exemption seems to have been allowed him, but the head-note having been written by the court seems to be evidence of the same trend of opinion noted above.

This doctrine of enforcing the laws of their domicil against non-resident creditors, though not enforceable against residents or citizens of third States, obtains quite commonly in the matter of foreign assignment laws.[17] We believe that it should be recognized where creditors attempt to evade the exemption laws of their domicil.

5. *Remedy by Injunction.*—A creditor who attempts to evade the exemption laws of his State by attachment or garnishment proceedings in a foreign jurisdiction against the property of a resident debtor, may be enjoined in the courts of his own State from commencing such proceedings or from further prosecuting them when already instituted.[18]

[13] Mineral Point R. Co. v. Barron, 83 Ill. 365.

[14] Commercial Nat. Bank Chicago v. C. M. & St. P. R. Co., 45 Wis. 172. See also, Morgan v. Neville, 74 Pa. St. 52.

[15] U. P. R. Co. v. Maltby, 34 Kan. 125; S. C., 23 Cent. L. J. 154; S. C., 8 Pac. Rep. 235.

[16] Wright v. C. B. & Q. R. Co., 19 Neb. 175; S. C., 27 N. W. Rep. 90. See also, Turner v. S. C. & P. R. Co., 19 Neb. 241, 246.

[17] May v. First Nat. Bank Attleboro, 26 Am. L. Reg. (N. S.) 506, and the writer's collection of authorities thereto appended.

[18] Snook v. Snetzer, 25 Ohio St. 516; Keyser v. Rice, 47 Md. 203; S. C., 28 Am. Rep. 448; Teager v. Landsley, 69 Ia. 725; S. C., 27 N. W. Rep. 739; B. & M. R. Co. v. Thompson, 31 Kan. 180; Zimmerman v. Franke, 34 Kan. 650; S. C., 9 Pac. Rep. 747; Mumper v. Wilson, 33 N. W. Rep. 449; S. C., 70 Ia. ——; Hager v.

The Supreme Court of Indiana recently said:[19] "The attempt to take from a workman the wages earned by him by sending the claim to a jurisdiction where our exemption laws will not avail him, is one that the courts will not tolerate. They will on the other hand lay the strong arm of chancery upon persons within their jurisdiction and prevent them from taking away the wages which our constitution and our statute wisely secure to him for the support of his family."

"In exercising this authority, courts proceed not upon any claim of right to control or stay proceedings in the courts of another State or country, but upon the ground that the person on whom the restraining order is made resides within the jurisdiction and is in the power of the court issuing it."[20]

In one case, where a Kansas creditor attached in Missouri the property of his debtor, also a resident of Kansas, the court of the latter State refused to grant an injunction; it appearing that the debt was just and due, and it not appearing that the debtor was free from fraud or that he had not other property exempt from the payment of his debts or that the exemption would not be allowed if claimed in Missouri under the laws of that State.[21] Possibly the fact that the property attached in a foreign State is exempt in the State where the plaintiff and defendant reside, may not of itself justify an injunction in all cases, though the above case seems to be the only instance of a refusal to grant it.

6. *Damages for Disobeying the Injunction.*—If a creditor disregards an injunction duly served on him and proceeds in the foreign jurisdiction to collect exempt earnings or sell exempt property, he may not only be punished for contempt, but he is liable for the amount so collected and judgment for it may be given in the injunction suit.[22]

7. *Remedy by Subsequent Action Against Creditor.*—When no injunction is sought, but the debtor relies on claiming his exemption in the foreign suit and fails therein, it would seem that a subsequent action against the attaching or execution creditor would lie in the courts of their domicil for the amount collected.[23] But in Indiana, where it is a statutory offense to go into a foreign jurisdiction to garnishee a debtor's earnings, or to assign or transfer the debt for that purpose, a creditor assigned his claim to parties in Kentucky, who there garnished and collected the debtor's earnings exempt in Indiana. It was held that an action for the amount collected would not lie against the creditor who had assigned the claim.[24]

8. *Subsequent Action Against Garnishee.*—It may be stated, as a general proposition, that the taking of property or the collection of a debt under attachment or garnishment proceedings in a foreign jurisdiction, is a good defense to a subsequent action against the bailee or garnishee for the same property or debt.[25] A *pending* foreign attachment or garnishment may be pleaded in *abatement* of an action subsequently brought by the principal debtor.[26] But the garnishee should disclose every fact that will prevent a judgment against him.[27] Where, pending a garnishment suit in Illinois, the principal debtor sued the garnishee in Wisconsin and collected the debt garnished, the garnishee was held liable to pay it again to the Illinois creditor, though the debt was exempt in Wisconsin and the Illinois suit had been pleaded *in defense* to the Wisconsin suit. It should have been pleaded *in abatement*.[28]

By the rule in some States the garnishee should interpose the exemption to which he knows the defendant to be entitled,[29] and in other States he must give notice of the proceedings to his creditor.[30] If he fails to set

Adams, 30 N. W. Rep. 36; s. c., 70 Ia. ——; Wilkinson v. Colter, 2 Kan. L. J. 202; s. c., 21 Cent. L. J. 21.

[19] Wilson v. Joseph, 107 Ind. 490; s. c., 8 N. E. Rep. 616.

[20] Snook v. Snetzer, 25 Ohio St. 516. And see the subject discussed in Cunningham v. Butler, 23 Cent. L. J. 274.

[21] Cole v. Young, 24 Kan. 435.

[22] Hager v. Adams, 30 N. W. Rep. 36; s. c., 70 Ia. ——; Teager v. Landsley, 69 Ia. 725.

[23] Albrecht v. Treitschke, 17 Neb. 205; Haswell v. Parsons, 15 Cal. 266; Phillips v. Hunter, 2 H. Bla. 402.

[24] Uppinghouse v. Mundel, 103 Ind. 238.

[25] Moore v. C. R. I. & P. R. Co., 43 Ia. 385; Leiber v. U. P. R. Co., 49 Ia. 688; B. & M. R. Co. v. Thompson, 31 Kan. 180: B. & O. R. Co. v. May, 25 Ohio St. 347; Morgan v. Neville, 74 Pa. St. 52; Bolton v. Pa. Co., 88 Pa. St. 261; 2 Pars. Cont. (7th ed.) 607, and cases cited.

[26] 2 Pars. Cont. (7th ed.) 607, and cases cited.

[27] Drake on Attachment, § 630.

[28] Roche v. R. I. Ins. Assn., 2 Ill. App. (Bradw.) 360.

[29] Wright v. C. B. & Q. R. Co., 19 Neb. 175; Turner v. S. C. & P. R. Co., 19 Neb. 241; C. & A. R. Co. v. Ragland, 84 Ill. 375. In some courts, however, he is not even allowed to claim the debtor's exemptions: Conley v. Chilcote, 25 Ohio St. 545; 36 Ohio St. 545.

[30] This is a disputed question: Leiber v. U. P. R. Co., 49 Iowa, 688. See also, Moore v. C. R. I. & P. R. Co., 43 Iowa, 385.

up such exemptions, or give such notice when required by the law of the common residence of himself and the defendant, and *the latter suffers thereby*,[31] he may be liable to him for the amount in the courts of their domicil.[32]

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[31] Not unless he suffers from the neglect: Turner v. S. C. & P. R. Co., 19 Neb. 241; Bolton v. Pa. Co., 88 Pa. St. 261; Leiber v. U. P. R. Co., 49 Iowa, 688.

[32] Pierce v. C. & N. W. R. Co., 36 Wis. 283; Wilkinson v. Hill, 6 Gray, 568.

RES JUDICATA.

This is a subject of considerable importance to magistrates, and the number of questions from time to time addressed to us upon it shows that it is constantly cropping up in practice. The case of Bollard v. Spring, affords a good illustration of the misapprehension which prevails upon the point. The facts of that case stated as shortly as possible are as follows: B was charged under 1 & 2 Will. 4, ch. 32, § 30, for trespassing in pursuit of game and was acquitted. Subsequently he was charged under section 23 of the same act with unlawfully using a dog for taking game without having a game license. The two charges related to the same matter and the same occasion, and the justices dismissed the second charge on the ground that it was *res judicata*. The case came before the high court, and it was then decided without hesitation or difficulty that the justices were wrong.

It is difficult to understand how the justices fell into the error. They appear to have considered that the test whether the matter was *res judicata* was that the facts proved before them in the first charge related to the same occasion as that which gave rise to the second charge, and they acted on the principle, if such it can be called, that a person cannot be twice tried for the same acts. But a very little consideration will show that this is not the test. That test depended upon the charge preferred, not upon the facts proved. It may happen, and does in fact often happen, that by the same act a person lays himself open to several criminal charges, and that he may be convicted of each and all of them. It is therefore important that the principal which governs the doctrine of *res judicata* in criminal cases should be clearly defined.

The true test as stated in Archbold's Criminal Law is whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction in the first. The important word in this definition is the word *necessary*. In the case to which we have referred, the justices thought the test was the evidence actually given. And as they had dismissed the first charge upon the defendant's proving an *alibi*, they thought they had determined the charge whether the defendants was elsewhere than on the land upon which he was said to have been trespassing, when, in reality, they merely determined that he was not guilty of the offense of trespassing in pursuit of game. The *alibi* was in no sense *res judicata*, and the defense should and might have been set up in answer to the second charge.

Applying the test as above stated to the two charges in Bollard v. Spring, we find that the first was one simply of trespass in pursuit of game. Now the evidence necessary to support that charge must be, first, that the defendant was trespassing, that is to say, that he was on land where he had no legal right to be; and secondly, that he was in pursuit or search of game. It is clear that he might be guilty of this offense, though he had a license to kill game. The second charge was that of using a dog for taking or killing game without having a proper license. The evidence necessary to support such a charge is simply that the defendant was using a dog to kill game, and had no license; and he might be convicted though he was not a trespasser, even if he were on his own land. The evidence necessary is thus quite different, and the defendant might well be convicted of one of the charges without being guilty of the other. Or he might be guilty and liable to be convicted of both. Indeed, if the offense were committed at a time when game was out of season he might be liable to be convicted of a third offense on precisely the same facts.

With the case of Ballard v. Spring may usefully be compared Reg v. Brackenridge.[1] There the defendant was charged with night poaching, and was acquitted by the justices, not on the merits of the case, but simply be-

[1] 48 J. P. 293.

cause they thought he had been improperly arrested, and because they erroneously considered that the improper arrest affected their jurisdiction. After the charge was dismissed the defendant was summoned for the same offense, the charge on the summons being precisely the same. The justices held that the matter was *res judicata*, and the court held that they were right. The defendant might have been convicted on the first occasion, but the charge was adjudicated upon and dismissed and became *res judicata*. The difference between the two cases is too clear to require explanation.

One of the cases cited in argument in Ballard v. Spring deserves a word of comment. We refer to Weymss v. Hopkins.[2] There the defendant was charged under § 78 of the Highway Act, 1835, with having caused hurt or damage to a person passing on a highway. The facts were that the defendant struck a horse upon which the complainant was riding and caused his horse to throw the complainant, whereby he sustained injuries. The defendant was convicted. Afterwards the complainant preferred a charge of assault against the defendant under 24 & 25 Vict. ch. 100, § 42, on the same facts. The justices again convicted, and the high court on a case stated quashed the conviction. Now this case is frequently mentioned in text-books as an authority for the proposition that a man cannot be twice convicted on the same facts. We have seen that this proposition is inaccurate. But it will be found that the decisions is in every way consistent with the true test of *res judicata* as above stated. The evidence necessary to support the charge of causing hurt or damage to a person is sufficient to procure a conviction of assaulting that person, and the defense of *res judicata* was, therefore, a sufficient answer to the second charge.

Many other cases might be cited to the same effect, but the foregoing are sufficient for illustrating the principle which underlies the doctrine under consideration. When, therefore, this defense is raised before justices, they should have regard to the charge before them, and that which is alleged as an estoppel. They may safely disregard the evidence, for that may have been the same on both occasions. If they decide that the evidence necessary to support the first charge would have been sufficient to enable them to convict on the second, the defense is made out; otherwise, it is not.—*Justice of the Peace, Eng.*

[2] L. R. 10 Q. B. 378; 39 J. P. 389.

FIRE INSURANCE—OTHER INSURANCE.

HAVENS V. HOME INS. CO.

Supreme Court of Indiana, May 24, 1887.

1. *Fire Insurance—Other Insurance—Sufficiency of Complaint.*—A complaint upon an insurance policy, alleging in effect an express agreement allowing other insurance, which agreement the company failed to insert in the policy, after promising to do so, and that, relying upon said promise and in pursuance of said agreement, the complainant did take out other insurance, is sufficient upon demurrer, where the policy expressly provides that such permission must be indorsed thereon.

2. *Same—Apportionment of Insurance.*—Where the insurance policy prohibits the taking out of other insurance on "the property insured, or any part thereof," without the written consent of the company, where the insurance is apportioned in the policy, part to a building and part to the furniture and household goods therein, other valid insurance upon the building alone, without the knowledge or consent of the company, invalidates the entire policy.

MITCHELL., J., delivered the opinion of the court:

This action was brought by Sarah Havens upon a policy of fire insurance issued to her by the Home Insurance Company of New York on the second day of December, 1883. The insurance was for the period of one year, against loss or damage by fire to the amount of $2,000, as follows: $1,500 upon the hotel buildings of the assured in Marion, Indiana, and $500 on her furniture and household goods therein. Among other stipulations, the policy contained the following: "If the assured shall have, or shall hereafter make, any other insurance on the property insured, or any part thereof, without the consent of the company hereon written, this policy shall be void." There was also the following stipulation in the policy: "The use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

The first paragraph of the complaint alleged the execution of the policy, and that the property thereby insured had been destroyed by fire on the thirtieth day of November, 1884, and that due proof of loss had been made, etc. This paragraph contains the following averment: "The plaintiff further avers that it was expressly agreed and understood that said plaintiff was to have

permission to take out an additional insurance of one thousand dollars on said building in any other company, and at any time she desired, and said company agreed to insert said condition in said policy, which it wholly failed to do. And plaintiff says that, relying upon said promise and in pursuance of said contract and agreement, she had effected an insurance on said building, in the sum of one thousand dollars, in the Phœnix Insurance Company of Brooklyn, New York, as permitted by the express agreement aforesaid." The court below sustained a demurrer to this paragraph of the complaint. The appellant's claim is that the averments above set out in effect show that the insurance company agreed or consented that the assured might procure other insurance on the building, and that having so consented it is now estopped to assert that there has been a breach of the condition because the consent of the company was not indorsed on the policy. It is said the agreement amounted to a waiver of the condition requiring that the consent of the company to other insurance should be so indorsed. Insurance policies are prepared by the companies; and contracts of insurance are usually consummated by experts on the one hand, and inexperts on the other. The policy of the law is, therefore, to give them such an interpretation as to prevent a forfeiture whenever, upon principles of fair construction, such a result is possible.

It is abundantly settled that, notwithstanding the conditions in the policy, if, at the time the insurance was effected, or afterwards, there were conditions, uses, or incidents of the risk which were in conflict with conditions in the policy, and which were known to the insurer or its agent, whose knowledge is imputable to the company, such conditions, uses, or incidents cannot be used to defeat a recovery after a loss has occurred. Issuing or continuing a policy of insurance with full knowledge by the company of existing facts, which, according to a condition of the contract, makes it voidable, is a waiver of the condition. If it were otherwise, the company would be enabled to perpetrate a fraud upon the assured. Home Ins. Co. v. Duke, 84 Ind. 253; Ætna Ins. Co. v. Shryer, 85 Ind. 362; Excelsior, etc., Ass'n. v. Riddle, 91 Ind. 84; Indiana Ins. Co. v. Capehart, 108 Ind. 270, 8 N. E. Rep. 285. Thus it has been held in a somewhat analogous case that, notwithstanding an insurance policy contained printed stipulations almost identical with those above set out in respect to obtaining other insurance, and in respect to matters which should not be construed as a waiver of any condition or restriction contained in the policy, yet where an agent whose authority was not shown to have been restricted, inserted in the policy, "$3,000 other insurance permitted," and who was shown to have had knowledge that other insurance had been obtained, but conveyed to the insured the impression that the written consent of the company was not necessary, it was held that the insurance company was estopped to dispute the validity of the additional insurance. Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Hadley v. Insurance Co., 55 N. H. 110; Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6; American Ins. Co. v. Luttrell, 89 Ill. 314.

The tendency of the modern cases is to hold that, if notice be duly given to the company, or its agent, of additional insurance, or if actual knowledge is brought home that other insurance exists, or has been obtained, and no objection is made, the company will be estopped from insisting on a forfeiture because its consent was not indorsed on the policy. Wood, Fire Ins. §§ 382, 383; May, Ins. §§ 369, 370. Having knowledge of the other insurance, the company may manifest its dissent by canceling its policy; otherwise it would be treated as having assented, and waived compliance with the condition. This does not deny the insurance companies the right to impose conditions upon which they will assume risks. It does nothing more than to prevent them from taking advantage of conditions when they have full knowledge of incidents and facts connected with the risk which are inconsistent with the conditions imposed. It should be observed that the authorities make a distinction, in this regard, between mutual insurance companies whose charters require that the consent of the company shall be indorsed on the policy in respect to certain matters, and such companies as regulate the subject-matter under consideration by contract merely.

The principles relied on, although abundantly supported as controlling in cases somewhat analogous to this, do not reach the necessities of the appellant's case. The case made by the first paragraph of the complaint proceeds upon the theory that another valid policy of insurance had been taken out by the assured in the Phœnix Insurance Company of Brooklyn, New York, after the issuance of the policy in suit, and before the destruction of the property by fire. It seeks to avoid the effect of the condition providing for a forfeiture of the policy by the averment that it was agreed that the plaintiff should have permission to take out additional insurance, to the amount of $1,000, in any company and at any time she desired to do so, and that the company agreed to insert such a stipulation in the policy, but wholly failed to insert the stipulation as agreed. It does not appear when this agreement was made, whether before or after the execution of the policy. If it was made before, it does not appear that the appellant was induced to accept the policy without full knowledge that the stipulation was absent, nor does the complaint ask for a reformation of the contract.

The appellant argues that a fair reading of the contract leads to the conclusion that it was made subsequent to the issuing of the policy. If this be conceded, it in nowise helps the appellant. If it were admitted that the oral agreement relied on were valid, it effects no substantial modification of the original contract. In any event, permission to take other insurance was to be in writing.

Such permission could only have been given by the assured presenting the policy to the company or its agent, and requesting that the stipulation be written in or upon the policy. After the execution of the policy, it was presumably in the possession of the assured. It does not appear that she ever requested that the stipulation orally agreed upon should be inserted, or that the company or its agent ever had any notice that she had taken or desired to take additional insurance. The company was therefore guilty of no neglect or wrong. The position of the appellant comes to this: After the policy was executed, an agreement was made that other insurance might be taken, and that a written stipulation to that effect would be inserted in the policy. Other valid insurance was taken, without any notice to the company, or request to insert the stipulation agreed upon, and now it is said the company is estopped to insist upon the condition printed in the policy. This position is not sustainable. As has been seen, insurance companies are estopped to insist upon the enforcement of conditions when they have knowledge of existing facts which are inconsistent with the conditions imposed. Knowledge of the facts raises a presumption that the company waived that condition, and, upon principles of honesty and fair dealing, the law holds it estopped to say to the contrary when such knowledge is shown. Admitting all the facts pleaded to be true, the insurance company has been guilty of no misconduct upon which an estoppel can be predicated. The assured has chosen to stand upon the policy as she received it. With the concession in her complaint that she violated a condition of the policy by taking other insurance without the consent of and without notice to the company or its agent, the court could not have done otherwise than sustain the demurrer.

The second paragraph of the complaint waived any right or claim to recover for the destruction of the building, and proceeded only for the loss of the furniture and household goods covered by the policy. To this paragraph the company answered the condition against obtaining other insurance on the property insured, or any part thereof, without the written consent of the company, and alleged that, since the issuance of the policy sued on, other valid insurance had been so obtained upon the hotel building. The answer further averred that the furniture covered by the policy was contained and used in the hotel, and that both formed one risk, and were insured by the same contract, and upon one and the same consideration. This was held to be a sufficient answer. Since part of the insurance was apportioned to the building, and part to the furniture and household goods therein, the question presented is whether it was competent for the plaintiff to recover that part apportioned to the furniture and household goods, notwithstanding the policy had been voided as to the building. On appellant's behalf the argument is that the contract is divisible, and that it does not follow that, because it was voided as to the building, it would also be voided in respect to the furniture. There is apparently some contrariety of opinion as to the construction of contracts of insurance, and as the right of the assured to recover in cases somewhat analogous to that under consideration. Where the contract is entire, it seems to be conceded that a breach of condition affects the entire risk; but the authorities are not uniformly agreed as to what constitutes an entire contract as applied to policies of insurance. So far as we are apprised, the question presented has not been heretofore considered by this court. Confining the decision to the case in hand, our conclusion, after a careful examination of the authorities, is that the policy under consideration is to be treated as an entire, indivisible contract in respect to the condition in question. The purpose of inserting conditions against other insurance in policies manifestly is to protect the company from the hazard of overinsurance, by compelling the assured to continue to be personally interested in the preservation of his property. The condition assumes that the vigilance of the property owner will be stimulated, and that he will be more watchful to guard against fire in case his relation to the property is such that its destruction by fire will entail a loss rather than a benefit upon him. Phenix Ins. Co. v. Lamar, 106 Ind. 513; 7 N. E. Rep. 241.

In order, therefore, to give effect to the condition according to the intent and purpose of the contract, it follows necessarily that where the property covered by one policy, although consisting of separate items, appears to be so situate as to constitute substantially one risk, then, even though separate amounts of insurance be apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible, the contract must be treated as entire, nevertheless. To such a policy the principles governing entire and indivisible contracts are applicable, for the reason that the matter which renders the policy void as to part affects the risk of the insurer in respect to the other items in the same manner as it affects those items in respect to which the contract is voided. In such a case the only effect of apportioning the amount of the insurance upon the separate items of property specified in the policy is to limit the extent of the company's liability to the sum specified upon each item or class of property insured. While many well-considered cases seem to justify a much broader conclusion than that above stated in regard to the indivisibility of insurance contracts, we believe that, in the main, the authorities may be harmonized on the principles above stated, which we regard as the better view of the subject. Ætna Ins. Co. v. Resh, 44 Mich. 55, 6 N. W. Rep. 114; McGowan v. People's Ins. Co., 54 Vt. 211; Gottsman v. Pennsylvania Ins. Co., 56 Pa. St. 310; Schumitsch v. American Ins. Co., 48 Wis. 26, 3 N. W. Rep. 595; Hinman v.

Hartford Ins. Co., 36 Wis. 159; Plath v. Minnesota, etc. Ass'n, 23 Minn. 479; Bowman v. Franklin Ins. Co., 40 Md. 620; Moore v. Virginia, etc. Co., 28 Grat. 508; Lovejoy v. Augusta Ins. Co., 45 Me. 472; Richardson v. Maine Ins. Co., 46 Me. 394; Gould v. York Ins. Co., 47 Me. 403; Barnes v. Union Mut. Ins. Co., 51 Me. 110; Day v. Charter Oak Ins. Co., *Id.* 91; Lee v. Howard Ins. Co., 3 Gray, 583; Kimball v. Howard Ins. Co., 8 Gray, 33; Friesmuth v. Agawam, etc. Co., 10 Cush. 537; Brown v. People's Mut. Ins. Co., 11 Cush. 280; Garver v. Hawkeye Ins. Co., 28 N. W. Rep. 555; Wood, Fire Ins. § 165.

In the following, among other, cases, which involved suits upon insurance policies wherein different properties were insured for separate sums, the contracts were held divisible, and the policyholder in each instance allowed to recover as to some of the separate items, notwithstanding there had been a violation of some condition which avoided the policy as to other items included in the same policy: Merrill v. Agricultural Ins. Co., 73 N. Y. 452; Trench v. Chenango Ins. Co., 7 Hill, 122; Koontz v. Hannibal, etc. Co., 42 Mo. 126; Loehner v. Home Ins. Co., 17 Mo. 247; Commercial Ins. Co. v. Spankneble, 52 Ill. 531; Hartford Ins. Co. v. Walsh, 54 Ill. 164.

While we concur in the suggestion that courts incline toward such a liberal construction of insurance contracts in favor of the assured as, if possible, to avoid a forfeiture, yet where parties have, without fraud, mistake, or surprise, deliberately entered into a contract, that alone must be looked to as furnishing the measure of their respective rights and obligations. Phenix Ins. Co. v. Lamar, *supra*. Courts cannot by construction compel insurance companies to assume obligations which they have fairly guarded against, in order to protect themselves against imposition, so that their solvency may be legitimately preserved in order to afford indemnity to policyholders who observe their contracts.

In the case under consideration, the risk on the furniture was affected by the same cause that rendered the policy void upon the building. It follows that the policy was avoided *in toto*.

The judgment is affirmed, with costs.

NOTE.—The principal case contains a very clear statement of the law involved and a full citation of authorities, and thus it may be said to annotate itself.

Conditions as to other insurance, like others working forfeitures of the policy, are generally strictly construed against the insurer.[1] Yet, it is said that such provisions are not regarded with the same jealousy as those ordinarily working forfeitures, but will be upheld without reluctance as fair and just provisions for a reasonable and proper purpose.[2]

The object of notice of other insurance is to "enable the insurer to act prudently and intelligently in relation to the risk."[3]

"The insurer can never know the full extent of his risk unless he knows everything that bears upon the risk."[4]

The condition as to other insurance generally relates only to other valid insurance. Hence, the procurement of other policies, which are invalid for any cause, does not avoid the policy.[5]

Thus, a policy with a provision that, "if any prior or subsequent insurance is made without the consent of the company, indorsed thereon," is not avoided by taking out foreign insurance on the same property, void because of non-compliance with statutory provisions.[6]

So, subsequent insurance, void by its own terms, is no insurance, within the meaning of the usual condition against other insurance.[7] And if such other insurance is only valid upon its face, it does not necessarily avoid the policy.[8] But "the other policy or policies must, at the time of the loss, have been inoperative, so that no action could be maintained to enforce them."[9]

Where a policy provided that other insurance, without consent, etc., "whether valid or not," would void the policy, etc., another policy in and of itself invalid and void, so that it constitutes no contract of insurance, is not within the prohibition, but if to avoid it requires the production of extraneous facts, it is withing the prohibition.[10]

The law also requires that the additional insurance must cover the *same* property. Hence, where one policy covers a building alone, and another covers the building, machinery, etc., this does not constitute a double insurance, within the meaning of the conditions of the policy.[11]

In Clark v. Hamilton Ins. Co.,[12] the policy covered "a carpenter's shop and carpenter's tools." It was held that evidence of the issuing of another policy to the same person upon "four chests of carpenter's tools in the wood shop," described as situated on the same street as in the first policy, did not show that any part of the property was covered by both policies,

[1] Rothchild v. American Ins. Co., 62 Mo. 356; Hutchison v. Western Ins. Co., 21 Mo. 101; May on Insurance (2d ed.), § 367.

[2] May on Insurance (2d ed.), § 364; Obermeyer v. Globe Mut. Ins. Co., 43 Mo. 573.

[3] Per McIlvane, J., in Dayton Ins. Co. v. Kelly, 24 Ohio St. 345; s. c., 15 Am. Rep. —.

[4] May on Insurance (2d ed.), § 364.

[5] 19 Myer's Fed. Dec., p. 579, *et seq.*; Thomas v. Builders' Ins. Co., 119 Mass. 121; Gee v. Cheshire Ins. Co., 55 N. H. 265; s. c., 20 Am. Rep. 170; Hubbard v. Hartford Ins. Co., 33 Iowa, 325; s. c., 11 Am. Rep. 12; Obermeyer v. Globe Mut. Ins. Co., 43 Mo. 573; Lindley v. Union Ins. Co., 65 Me. 368; s. c., 20 Am. Rep. 701; Central Ins. Co. v. Watson, 23 Mich. 486; 2 Wood on Fire Insurance (2d ed.), p. 771, § 372; May on Insurance (2d ed.), § 365; Allison v. Phœnix Ins. Co., 3 Dill. C. C. 480; s. c., 19 Myer's Fed. Dec. § 360, p. 579, § 361, p. 581; Behrens v. German F. Ins. Co., 64 Iowa, 19.

[6] May on Insurance (2d ed.), § 365; Sutherland v. Old Dominion Ins. Co., 31 Gratt. (Va.) 176. But see Carpenter v. Providence Ins. Co., 94 How. (U. S.) 185; Deitz v. Mound City Ins. Co., 38 Mo. 85; 2 Wood on Fire Insurance (2d ed.), p. 771, § 372, n. 1; Behler v. Germania Ins. Co. (Ind.), 9 Ins. L. J. 778.

[7] May on Insurance (2d ed.), § 365.

[8] Schenck v. Mercer Ins. Co., 22 N. J. L. 447.

[9] 2 Wood on Fire Insurance (2d ed.), 272. See Clark v. N. E. Mut. Ins. Co., 6 Cush. (Mass.) 542; Hardy v. Union Ins. Co., 4 Allen, 217; Jackson v. Mass. F. Ins. Co., 23 Pick. 418; Mitchell v. Lycoming Ins. Co., 51 Pa. St. 402.

[10] Phœnix Ins. Co. v. Lamar, 106 Ind. 518; s. c., 53 Am. Rep. 764.

[11] 2 Wood on Fire Insurance (2d ed.), § 375, p. 782; Sloat v. Royal Ins. Co., 49 Pa. St. 14.

[12] 9 Gray, 148.

where it also appeared that there were in the shop two chests of tools belonging to the assured and others belonging to the assured's journeymen.[13]

But where another policy is issued, covering a part only of the property, when that part of the property is separately valued in the other policy, it avoids the policy.[14]

Thus, a policy upon a stock of goods at a specified sum, and upon the fixtures at a particular amount, is avoided by subsequent insurance upon the fixtures alone.[15]

"It is enough if the subsequent insurance covers a part of the interest embraced in the prior insurance, as where an undivided half of a house, or a part of the goods already insured, is covered by the new insurance, or the subject-matter of the subsequent insurance embraces the property covered by the prior insurance and other property besides." [16]

But under a policy insuring a building and prohibiting other insurance upon property "connected with it," insurance upon goods in the building is not other insurance, within the meaning of the prohibition.[17] It is held that the burden of establishing that the same property is covered by both policies is upon the insurer,[18] and this is said to be a question of fact, and not one of law.[19] * *

[13] See Vose v. Hamilton Ins. Co., 39 Barb. 302; Jones v. Maine Ins. Co., 18 Me. 155.

[14] 2 Wood on Fire Insurance (2d ed.), pp. 782, 783.

[15] Kimball v. Howard Ins. Co., 8 Gray, 33. But see Ill. Ins. Co. v. Fix, 53 Ill. 151.

[16] May on Insurance (2d ed.), § 366.

[17] Jones v. Maine Mut. Ins. Co., 18 Me. 155; Ill. Mut. Ins. Co. v. O'Neil, 13 Ill. 89.

[18] Clark v. Hamilton Ins. Co., 6 Gray, 169.

[19] Nave v. Columbia Ins. Co., 2 McMull. (S. C.) 220; 2 Wood on Fire Insurance (2d ed.), p. 783, § 375; Clark v. Hamilton Ins. Co., 9 Gray, 148; Stacy v. Franklin Ins. Co., 2 Watts & S. 506; May on Insurance (2d ed.), § 367; Storer v. Elliot F. Ins. Co., 45 Me. 175.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE MASTER AND SERVANT.

WORMELL V. MAINE CENTRAL R. CO.

Supreme Judicial Court of Maine, June 4, 1887.

1. *Master and Servant — Negligence — Burden of Proof—Presumption.*—The fact that the servant was injured, raises no presumption of negligence on the part of the master, but such negligence must be proved by the plaintiff.

2. *Same—Contract — Care.*—The contract of employment implies that both master and servant will exercise ordinary and reasonable care.

3. *Same—Risks.*—The servant assumes the patent risks and such as he is aware of. The master must inform him of unknown risks.

4. *Trial—Court — Jury.*—The court can take the case from the jury when the evidence is too slight to be considered by them or is conclusive against the plaintiff.

FOSTER, J., delivered the opinion of the court: The plaintiff was at work as a locomotive machinist in the car-shops of the defendant corporation at Waterville. On the day the injury was received he was directed by the foreman of the car-shops to go out with an engineer, and move an engine from the paint-shop near by to the repair-shop where the plaintiff worked. The engine with which the moving was to be done was then standing on the turn-table in the machine-shop. In order to move the engine from the paint-shop to the repair-shop, it became necessary, first, to remove certain cars which were on the track in the yard. The plaintiff went out, and while waiting for the switches to be turned, Philbrick, the master mechanic of the road, came out, and asked him if he knew how to shackle the passenger car that stood upon the paint-shop tracks, and the plaintiff replied that he did not know how to shackle any cars. Thereupon the master mechanic took him to the car, and explained the peculiar danger that might arise from the shackling of a passenger car, no special instructions being given in relation to shackling flat cars, but told him he must not get in line of the draw-bars, and finally told him that he guessed he could get along by being careful. The flat cars stood next to the engine, and had to be coupled first. In attempting to couple the tender to the first flat car he made several efforts, but failed, as he claimed, because the shackles were too short. Finally, when the engine and tender backed the third time, standing as he stood before, between the tender and the flat car, with the tender on his right and the flat car on his left, while adjusting the shackle with his right hand, he allowed the wrist of his left hand to rest over the edge of the dead-wood of the flat car, directly over its draw-bar, and directly in front of the buffer upon the tender, which is a projecting arm out of which the shackle extends, and, failing to connect the shackle with the draw-bar of the car, the buffer came back against and crushed his left hand, necessitating its amputation.

The plaintiff bases a recovery against the defendant corporation upon two grounds—that the implements and means furnished were not proper and suitable for the work which the plaintiff was directed to do; and that Philbrick, representing the corporation as a vice-principal, placed him in a position of peculiar peril without notifying him of the danger.

The latter position is the one most strenuously urged and relied on by the plaintiff, who recovered a verdict against the defendant, and the case is now before this court on motion to set aside the verdict, and also on exceptions. With the view which the court has taken of the case it does not become necessary to determine in what capacity Philbrick was acting, whether as vice-principal or as a fellow-servant with the plaintiff, inasmuch as it is the opinion of the court that the verdict cannot be upheld upon other grounds. The action set forth is founded upon the charge of negligence. It is the gist of the action. To entitle the plaintiff to recover, he must prove such negli-

gence, the omission of some duty, or the commission of such negligent acts on the part of the defendant as occasioned the injury to the plaintiff. If the injury was occasioned through his own neglect and want of ordinary care, or was the result of accident solely, the defendant being without fault, the action is not maintainable. "The negligence is the gist of the action, but the absence of negligence contributing to the injury, on the part of the plaintiff, is equally important." Brown v. Europern & N. A. Ry. Co., 58 Me. 387; Osborne v. Knox & Lincoln R. R., 68 Me. 51.

There is no presumption of negligence on the part of the defendant from the fact alone that an accident has happened, or that the plaintiff has received an injury while in the employment of the defendant. In the long line of decisions, both in this country and England, from Priestley v. Fowler, 3 Mees. & W. 1, to the present time, it has been held that the mere fact of the relationship of master and servant, without a neglect of duty, does not impose upon the master a guaranty of the servant's safety, but that the servant, of sufficient age and intelligence to understand the nature of the risks to which he is exposed, engaging for compensation in the employment of the master, takes upon himself the natural, ordinary, and apparent risks and perils incident to such employment. Coolbroth v. Maine Cent. R. Co., 77 Me. 167; Nason v. West, 78 Me. 257, 3 Atl. Rep. 911.

The relationship of master and servant may, and most frequently does, exist by simple mutual agreement that the servant is to labor in the service of the master. In such case the law holds that the terms of the contract are not fully expressed, and that there exists by implication reciprocal rights and obligations on the part of each which it will protect and enforce equally as if expressed by the parties. Among other things, it implies that each is to exercise ordinary and reasonable care. It implies that the master is to use ordinary care in providing and maintaining suitable means and instrumentalities with which to conduct the business in which the servant is engaged, so that the servant, being himself in the exercise of due care, may be enabled to perform his duty without exposure to dangers not falling within the obvious scope of his employment. The implied duty of the master in this respect is measured by the standard of ordinary care. Hull v. Hull, 78 Me. 117, 3 Atl. Rep. 38. The law holds him to no higher obligation than this. Nor is the employer bound to furnish the safest machinery, instrumentalities, or appliances with which to carry on his business, nor to provide the best methods for their operation, in order to save himself from responsibility, resulting from their use. If they are of an ordinary character, and such as can with reasonable care be used without danger, except such as may be reasonably incident to the business, it is all that the law requires. Railroad Co. v. Sentmeyer, 92 Pa. St. 276. Thus it has been held that where an injury happens to a servant while using an instrument, an engine, or a machine in the course of his employment, the nature of which he is as much aware of as his master, and in the use of which he receives an injury, he cannot, at all events, if the evidence is consistent with his own negligence in the use of it as the cause of the injury, recover against his master, there being no evidence that the injury arose through the personal negligence of the master; and that it was no evidence of such personal negligence of the master that he had in use in his business an engine or machine less safe than some other in general use. Dynen v. Leach, 26 Law J. Exch. 221. And in accordance with the same principle it was held in Indianapolis, B. & W. Ry. v. Flanigan, 77 Ill. 365, that a railroad company was not liable for an injury received by an employee while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed.

So in Fort Wayne, etc., R. R. v. Gildersleeve, 33 Mich. 133, it was decided that a railroad company which used in one of its trains an old mail car, which was lower than others, was not liable to its servant, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger was greater than with cars of equal height.

Every employer has the right to judge for himself in what manner he will carry on his business, as between himself and those whom he employs, and the servant having knowledge of the circumstances must judge for himself whether he will enter his service, or, having entered, whether he will remain. Hayden v. Smithville, 29 Conn. 548; Buzzell v. Laconia Manuf'g Co., 48 Me. 121; Shanney v. Androscoggin Mills, 66 Me. 427; Coombs v. New Bedford Cordage Co., 102 Mass. 585; Ladd v. New Bedford R. Co., 119 Mass. 413.

Moreover, the law implies that where there are special risks in an employment of which the servant is not cognizant, or which are not patent in the work, it is the duty of the master to notify him of such risks; and, on failure of such notice, if the servant, being in the exercise of due care himself, receives injury by exposure to such risks, he is entitled to recover from the master whenever the master knew, or ought to have known, of such risks. It is unquestionably the duty of the master to communicate a danger of which he has knowledge and the servant has not. But there are corresponding duties on the part of the servant; and it is held that the master is not liable to a servant who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom. Lovejoy v. Boston & L. R. R., 125 Mass. 82; Ladd v. New Bedford R. Co., *supra;* Priestley v. Fowler, *supra.*

It is his duty to use ordinary care to avoid injuries to himself. He is under as great obligation to provide for his own safety, from such dangers as are known to him, or discoverable by the exer-

cise of ordinary care on his part, as the master is to provide it for him. He may, by the want of ordinary care, so contribute to an injury sustained by himself as to destroy any right of action that might under other circumstances be available to him. These rules are elementary and fundamental, and are everywhere recognized. They grow out of the necessities of the relation of master and servant, and are founded and sustained by public policy. Though dressed in language differing somewhat in style of expression, it will be found that the decisions generally are in accord with the principles herein expressed. One writer has summed up the doctrine in the following language: "As we have seen it to be the duty of the master to point out such dangers as are not patent, so it is the duty of the employee to go about his work with eyes open. He cannot wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work when there is danger. He must inform himself. This is the law everywhere." Beach, Contrib. Neg. § 138; Russell v. Tillotson, 140 Mass. 201, 4 N. E. Rep. 231.

In speaking of the respective duties and obligations between master and servant, in reference to dangers which are concealed and those which are obvious, the court, in Cummings v. Collins, 61 Mo. 523, say: "The defendants are not liable for any injury resulting from causes open to the observation of the plaintiff, and which it required no special skill or training to foresee were likely to occasion him harm, although he was at the time engaged in the performance of a service which he had not contracted to render." Upon a careful examination of the evidence in the case under consideration, we are satisfied that the verdict cannot stand. There is not sufficient evidence upon which a jury could properly found a verdict that the plaintiff himself was in the exercise of due care at the time he received his injury.

This is an affirmative proposition which, in this State and many of the others, it is incumbent on the plaintiff to make out by proof he could be entitled to recover. Dickey v. Maine Tel. Co., 43 Me. 492; Lesan v. Maine Cent. R. Co., 77 Me. 87; State v. Same, *Id.* 541; Crafts v. Boston, 109 Mass. 521; Taylor v. Carew, Manuf'g Co., 140 Mass. 151, 3 N. E. Rep. 21.

Nor will this proposition be sustained where the evidence in reference is too slight to be considered and acted on by a jury. It must be evidence having some legal weight. Such is the general doctrine of the decisions. A mere *scintilla* of evidence is not sufficient. Connor v. Giles, 76 Me. 134; Riley v. Connecticut River R. R., 135 Mass. 292; Corcoran v. Boston & A. R. R., 133 Mass. 509; Nason v. West, 78 Me. 256, 3 Atl. Rep. 911, and cases there cited; Cornman v. Eastern Counties Ry. Co., 4 Hurl. & N. 784.

It is not denied, as contended for by the learned counsel for the plaintiff, that the question of due care is ordinarily one of fact for the jury. But the question oftentimes becomes one of law whether there are such facts or circumstances upon which the jury can properly base their determination in favor of such care. If not, it is within the province of the court, in the due administration of justice according to well-settled legal principles, to revise their findings. And in this case the evidence uncontradicted from the plaintiff himself as to the manner of the accident is conclusive against the verdict upon this point. Not only do the facts as detailed by him, and about which there appears to be no controversy, fail to show the exercise of due care, but rather that degree of carelessness and neglect on his part which must be held to have very largely, if not wholly, contributed to the injury complained of. He was a man 55 years of age, and had been for many years familiar with engines of all constructions, had been a locomotive machinist for twelve years, repairing them constantly, and six years in the employ of the defendant corporation. For five years prior to the accident engines with buffers had been in common use upon the road, and he had worked upon every pattern of engine that came into the shops where he was employed. He testifies that the engine with which he was injured came that morning from the repair-shop where he was working, and that it might have been there four or five weeks, and he might have worked on it. He had received a general warning from Philbrick to be careful, and was specially warned of the danger in reference to shackling passenger cars. It also appears from his testimony that he stood there watching the clearing of the tracks for 15 to 30 minutes. He had full leisure to examine and inform himself of all the common dangers incident to shackling. It appears that he attempted three times to do the shackling, and the third time he received the injury. The first time he stood with the engine backing down upon his right, himself facing the engine, and shackling apparatus on its rear, of which the buffer was the most prominent part. The shackle itself, which he took hold of, projected from the buffer, and he could not see one without seeing the other. Everything was in plain sight. It was in broad day-light. At the first attempt he failed to connect the shackle with the draw-bar. Consequently the tender brought up against the dead-wood of the car on his left. As the shackle did not connect, the contact between the tender and the flat car could only have been caused by the buffer striking against the dead-wood of the car precisely in the spot where he afterwards placed his left hand, and received his injury. He then tried a new shackle, repeating the same process. The second time the shackle failed to connect, and the engine and car came together again in precisely the same manner as at first, the buffer again striking the car at the very point where afterwards he placed his hand. After these two attempts, immediately under his eye, he tried a third shackle; and the engine a third time backed down towards him,

again giving him full opportunity for observation —he facing the buffer as before, and necessarily looking right into the shackling apparatus of which the buffer was a part, and this time hung his left wrist over the front edge of the center of the dead-wood, directly in front of the approaching buffer, in precisely the same place where the buffer had just struck the dead-wood twice before. It was, as the evidence shows, the only place upon the car where he could not have placed his hand with perfect safety. Placing it where he did, the injury was inevitable. It required no special skill or training to know that such an act would necessarily result in injury. This was not an extraordinary or concealed danger, which required to be specially pointed out to a person of mature years and ordinary intelligence. He had been employed, as he himself testifies, for twelve years solely in work about and upon all manner of engines and cars, including engines with buffers precisely as this one was equipped. No man needs a printed placard to announce a yawning abyss when he stands before it in broad day-light. Yeaton v. Boston & L. R. R., 135 Mass. 418; Coolbroth v. Maine Cent. R. Co., 77 Me. 168; Railroad Co. v. Keenan, 103 Pa. St. 124; Osborne v. Knox & L. R. R., 68 Me. 51.

And it was held in Wheeler v. Wason Manuf'g Co., 135 Mass. 298, that where the servant is as well acquainted as the master with the dangerous nature of the machinery or instrument used, or of the service in which he is engaged, he cannot recover. Beach, Contrib. Neg. § 140. Very similar were the facts in the case of Hathaway v. Railroad, 51 Mich. 253, 47 Amer. Rep. 569, and 16 N. W. Rep. 634, to these in the case before us. There the plaintiff, an experienced brakeman, was called upon by the conductor in the night-time to couple two cars of the Erie road which were made specially dangerous by having double dead-woods, which the plaintiff had never seen before. In that case, as in the present, one of the real grounds set up by the plaintiff was that he had not been sufficiently instructed in what was required of him by the company to enable him to discover and appreciate the danger, and that some notice thereof should have been given him by the company other than the general one which he received. The court say: "The plaintiff had the full opportunity of examining the one by which he stood some moments before the cars came together. Its size, shape, and the location of the draw-bar were before him. He had only to look at it to be informed of any perils surrounding it. The moving car at a distance of 20 feet, with its dead-wood and draw-bar in plain view, slowly approached the one where the plaintiff was standing. It does not appear that there was any hurry about the business. How could the plaintiff have been better warned? He could see the dead-woods and draw-bar thereon, as well as if he had made the coupling of them a thousand times before. He could not fail to see if he looked at all." See, also, Taylor v. Carew Manuf'g Co., 140 Mass. 151, 3 N. E. Rep. 21.

If the plaintiff, as is contended, was at the time of this unfortunate occurrence in the performance of duties outside of his regular employment, he will nevertheless be held to have assumed the risks incident to those duties. This principle is settled by numerous decisions. Woodley v. Metropolitan Dist. Ry. Co., 2 Exch. Div. 389; Railroad v. Fort, 17 Wall. 553; Rummell v. Dilworth, 111 Pa. St. 343, 2 Atl. Rep. 355, 363; Buzzell v. Laconia Manuf'g Co., 48 Me. 121; Hayden v. Smithville Manuf'g Co., 29 Conn. 548; Wright v. New York Cent. R. R., 25 N. Y. 570; Leary v. Boston & A. R. R., 139 Mass. 587, 2 N. E. Rep. 115.

In the last case cited, where the question is fully discussed, the court say: "Where one has assured an employment, if an additional or more dangerous duty is added to his original labor, he may accept or refuse it. If he has an existing contract for the original service, he may refuse the additional and more dangerous service; and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and, while he may require the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience." From the disposition of the case already made, it becomes unnecessary to consider the defendant's exceptions. The law pertaining to the case, in order to cover it fully at the time of the trial, was necessarily somewhat complicated; and it is very questionable whether the numerous abstract propositions appearing in the charge, and following each other in quick succession, could be readily comprehended by a jury unaccustomed to grapple with abstruse and intricate legal propositions. While the charge may have been correct in the abstract, we are of the opinion that several of the defendant's requested instructions were proper to a full understanding of the principles involved, and their application to the questions at issue, and should have been given.

As the case is disposed of, however, on other grounds, nothing further need be said in relation to the exceptions.

Motion sustained. New trial granted.

NOTE.—Since the first case reported on the subject of the liability of an employer for injuries received in his employ by his employee, caused by the negligence of another employee, which is that of Priestly v. Fowler, reported in 1837,[1] a vast number of such cases have been adjudicated. At first the inclination was to exempt the master from liability for such accidents,[2] but now the drift is in the other direction.

The master must provide proper and safe appliances and machinery for his servants, and must see that they are kept in that condition.[3] He is not

[1] 3 Mee. & W. 1.

[2] Murray v. South Carolina R. Co., 1 McMullan, 385; Farwell v. Boston, etc. R. Co., 4 Metc. 49.

[3] Gilmore v. N. P. R. Co., 9 Sawy. 558; Hough v. Rail-

bound to furnish the best machinery in the market, but only such as is proper for and is used in the business,[4] though it has been held that, owing to the great hazards of railroading, the best appliances known must be provided in that business.[5]

At first it was considered that the master was not liable for injuries sustained by one servant, caused by the negligence of another servant, unless the latter servant had been intrusted with the control of all the business, was his *alter ego*.[6] Then it was held that the latter must have power to employ and discharge inferior servants; and now many courts hold that it is only necessary that the inferior servants should be under his control and subject to his orders.[7]

The mere fact that the accident occurred to the servant raises no presumption that the master was negligent, but his negligence must be proved.[8] But it is only necessary to raise a reasonable presumption of the master's negligence.[9]

The servant assumes the ordinary risks of the business and all risks of which he is aware.[10] So, if he works outside of his regular employment, he assumes the risks of which he is aware.[11] It has been held that, if he knows that the machinery is defective, and notifies the master thereof, he may continue his work for a reasonable time for the correction thereof before he assumes the risk of accident therefrom.[12] It has also been held that the master is guilty of negligence when the machinery is so constructed that the slightest indiscretion by the servant will produce damage.[13]

As stated in the principal case, the question of negligence is ordinarily one for the jury. But when the facts are undisputed, the question of negligence is a matter of law. So, when the plaintiff fails to make out a *prima facie* case, the court is not required to submit the question to the jury, since it would be compelled to set aside a verdict in favor of the plaintiff, and the law never requires a useless thing to be done.[14] * *

way Co., 100 U. S. 213; Pantzar v. Tilly, etc. Co., 99 N. Y. 369; Schultz v. Chicago, etc. R. Co., 48 Wis. 375; Ford v. Fitchburg R. Co., 110 Mass. 240; Mullan v. Phila., etc. Co., 78 Pa. St. 25.

4 Wonder v. Baltimore, etc. R. Co., 32 Md. 411; Fort Wayne R. Co. v. Gildersleeve, 33 Mich. 133; Western R. Co. v. Bishop, 50 Ga. 465; Salters v. Delaware, etc. Canal, 3 Hun, 338.

5 Nashville, etc. R. Co. v. Elliott, 1 Coldw. 611.

6 Brothers v. Carter, 52 Mo. 372; Malone v. Hathaway, 64 N. Y. 5.

7 Chicago, etc. R. Co. v. Ross, 112 U. S. 377; Gravelle v. Minn., etc. R. Co., 3 McCrary, 352; Lalor v. Chicago, etc. R. Co., 52 Ill. 401; Chicago, etc. R. Co. v. Lundstrom, 16 Neb. 254; Cowles v. Richmond, etc. R. Co., 84 N. C. 309.

8 Wright v. New York, etc. R. Co., 25 N. Y. 562; Kansas, etc. R. Co. v. Salmon, 11 Kan. 83; Davis v. Detroit, etc. R. Co., 20 Mich. 105; Central R. Co. v. Kenney, 58 Ga. 485; Nolan v. Shickle, 3 Mo. App. 300; Duffy v. Upton, 113 Mass. 544; Colorado, etc. R. Co. v. Ogden, 3 Colo. 499.

9 Greenleaf v. Illinois, etc. R. Co., 29 Iowa, 14.

10 Coombs v. New Bedford C. Co., 102 Mass. 572; Wonder v. Baltimore, etc. R. Co., 32 Md. 411; Chicago, etc. R. Co. v. Harney, 28 Ind. 28; Fort Wayne, etc. R. Co. v. Gildersleeve, 33 Mich. 133; Kielley v. Belcher, etc. Co., 3 Sawy. 500; Jones v. Yeager, 2 Dill. 64; Honner v. Ill., etc. R. Co., 15 Ill. 550; Devitt v. Pacific R. Co., 50 Mo. 302.

11 Lalor v. Chicago, etc. R. Co., 52 Ill. 401.

12 Crutchfield v. Richmond, etc. R. Co., 78 N. C. 300.

13 Toledo, etc. R. Co. v. Fredericks, 71 Ill. 294.

14 Nolan v. Shickle, 3 Mo. App. 300; Railroad Co. v. Stout, 17 Wall. 657; Westchester, etc. R. Co. v. McElwee, 67 Pa. St. 311; Houfe v. Fulton, 29 Wis. 296; Fleming v. West., etc. R. Co., 39 Cal. 253; McLain v. Van Zandt, 7 7 Jones & Sp. 347.

FRAUDULENT CONVEYANCE—PREFERENCE—PARTNERSHIP—EVIDENCE.

SOUTHERN WHITE LEAD COMPANY V. HAAS.

Supreme Court of Iowa, June 27, 1887.

1. *Preference of Creditors.*—In Iowa, the right of a debtor to prefer such of his creditors as he may choose, and to secure their claims to the exclusion of all others, is wholly unrestricted by law.

2. *Partnership—Evidence—Failure to Pay in Capital.*—If it appears from the article of partnership that the parties designed to begin business at once, a partner failing to pay in his share of the capital is nevertheless a partner, and liable as such.

3. *Evidence—Declarations.*—Proof of the declarations of a partner that, at the time certain mortgages were made, he was a member of the firm, is admissible to discredit his testimony at the trial that he was not then a member, but is not admissible for any other purpose.

REED, J., delivered the opinion of the court:

For many years prior to the second of October of 1882, Otto Junkerman and Julius W. Haas were engaged in business as partners, under the firm name of Junkerman & Haas. On that date they signed articles of copartnership with F. Raforth, Jr. As it is a question in the case whether a partnership with Raforth as a member was ever in fact constituted, it is material to set out some of the provisions of said articles. They are as follows:

"These articles of copartnership, made and entered into this second day of October, 1882, by and between Otto Junkerman, Julius W. Haas, and F. Raforth, Jr., all of the city and county of Dubuque, State of Iowa, witnesseth:

"(1) That the said parties hereto, in consideration of the terms and covenants hereinafter mentioned, and for the purpose of carrying on and continuing the wholesale and retail drug business prior to the date of these presents, in said city of Dubuque, prosecuted and carried on conjointly by the said Otto Junkerman and Julius W. Haas, do hereby form, enter into, and constitute themselves a copartnership, under the firm name and style of Junkerman & Haas, being the name and style of the predecessors of the copartnership herein formed.

"(2) The said copartnership is to be and continue for the full term of five years from and after the date of these presents.

"(3) The capital stock of permanent business fund of this copartnership is to be sixty thousand dollars, furnished in equal shares by the said parties hereto, and is to consist of drugs, goods, wares, and mdse., stock in trade, fixtures, etc., purchased by this copartnership of the old firm of Junkerman & Haas at prices as per present inventory of stock of said old firm; that is to say, the said Otto Junkerman and Julius W. Haas are each to place into the business of this copartnership the sum of twenty thousand dollars in goods,

wares, and merchandise and fixtures of the old firm of Junkerman & Haas, and the said F. Raforth, Jr., is likewise to place in the business of this copartnership the said sum of twenty thousand dollars in goods, wares, mdse., fixtures, etc., which he shall first have purchased of the old firm of Junkerman & Haas, paying therefor to the members of said firm the sum of ten thousand dollars cash, and giving them his promissory note for ten thousand dollars, payable on or before five years after the date of these presents, and bearing interest at the rate of seven per cent. per annum, said interest being due and payable on the first day of January, 1884, and on the first day of January of each year thereafter until paid; the said inventory already taken of the stock in trade, etc., of said old firm of Junkerman & Haas in all cases forming the basis of computation.

"(4) The said capital stock or common business fund of said copartnership may be increased, but shall not be diminished, during the continuance of the copartnership.

"(5) * * * * * * * * *

"(6) This copartnership assumes none of the liabilities of the old firm; neither shall it have any claim or interest in and to the assets of the old firm of whatsoever name, nature or description. It is understood, however, that all the members of this copartnership shall lend their labor, time, and counsel to the liquidation of the liabilities of the old firm, as well as to the disposition of and realization from assets of the old firm.

"(7) If, at the time of the commencement of this copartnership, the stock of goods, etc., of the old firm of Junkerman & Haas should inventory for more than sixty thousand dollars (the amount of the capital stock of the new firm), then such excess over sixty thousand dollars shall be received and retained by this copartnership, giving to Otto Junkerman and Julius W. Haas credit on the books of this copartnership therefor; the amount of such credit to them, respectively, being payable as by the parties hereto hereafter determined. * * *"

Raforth paid $7,300 of the amount which he agreed to pay in cash soon after the articles were signed. He did not, however, give the promissory note provided for in the articles, and he has never paid the balance of the cash payment. It does not appear that demand was ever made for the note, although he was requested by the other parties to pay the balance of the money due. The parties entered upon business as provided in the articles; Raforth giving his attention to the business, and being recognized and treated as a partner by the others. The old firm was largely indebted when the arrangement was made, and on the twenty-sixth of September, 1883, being pressed by some of the creditors, Junkerman & Haas executed the three mortgages in question, covering all the personal property of the firm. The first mortgage was to defendant Peter Keine, and was given to secure sixteen promissory notes held by him against the firm, eleven of which bore date before and the others after October 2, 1882, and to indemnify him against liability as guarantor of a note held against them by a third party which bore date before that time; also against liability as guarantor of an account against the firm, the date of which is shown. The total amount of indebtedness secured by that mortgage was $10,696, of which amount $5,196 clearly appears to have been incurred before October 2, 1882. The second mortgage, which covers the same property, was also given to Keine, and was for the security of thirty-three notes given by the firm to various persons for money borrowed through Keine. The aggregate amount of the notes is $16,940, and they all bear date before October 2, 1882, except seven, the aggregate amount of which is $3,140. That mortgage, by its terms, is subject to the one given for Keine's personal security. The third mortgage, which also covers the same property, was also given to Keine, and was given for the security of thirty-eight notes held by various persons against the firm, aggregating in amount $28,986.50. Twenty-six of those notes bear date before October 2, 1882. The others aggregate $7,766, and bear date after that. The mortgage, by its terms, is subject to the two preceding ones. The plaintiff's each obtained a judgment against the firm of Junkerman & Haas. The debts evidenced by these judgments were all incurred after October 2, 1882. They garnished Keine and his attorney or agent while the money derived from the sale of the mortgaged property was in their hands, and afterwards instituted this suit (which is an equitable action) to cancel the mortgages, and subject the money derived from the sale of the property to the payment of their judgment, on the grounds, (1) that the transaction was, in effect, a general assignment for the benefit of creditors, and is void under the statute because not made for the benefit of all the creditors in proportion to the amount of their claims; and (2) that the mortgages, being executed by but two members of the firm, without the knowledge or consent of the other partner (which is the fact if Raforth was a partner when they were given), and being given to secure debts for which the partnership owning the property was not liable, are void, and created no lien upon the property.

1. The first ground of objection has not been much insisted upon in this court. With reference to it, we deem it sufficient to say that the evidence shows very clearly that the mortgages were intended as securities for the several debts enumerated in them, and they were given on the demand of the creditors for security. The rule is now well settled in this State that a debtor in failing circumstances may mortgage the whole of his property for the security of a portion of his creditors, even though the effect of the transaction is to defeat the collection of his unsecured debts. Perry v. Vezina, 63 Iowa, 25, 18 N. W. Rep. 657; Farwell v. Jones, 63 Iowa, 316, 19 N. W.

Rep. 241; Cadwell's Bank v. Crittenden, 66 Iowa, 237, 23 N. W. Rep. 646; Gage v. Parry, 69 Iowa, 609, 29 N. W. Rep. 822; Aulman v. Aulman, 32 N. W. Rep. 240.

2. The case turns on the question whether Raforth was a member of the firm when the mortgages were executed. If he was a partner at that time, his partners had no power to pledge the partnership property for the security of the debts of the old firm, and for which they alone were responsible. This is not denied by counsel, but the effort has been to establish that he was not in fact a partner at that time. It was contended, in argument, that the provisions of the articles by which he covenanted to purchase and put into the business $20,000 worth of the goods and merchandise of the old firm, and to pay therefor $10,000 in cash, and give his note for the balance, is in the nature of a condition precedent; and, as he failed to perform the condition, the partnership was never in fact constituted. But this position cannot be maintained. It is clear, we think, from the language of the first division of the articles, that it was the intention of the parties that the partnership should begin at once. The language is "that the parties, in consideration of the terms and covenants hereinafter mentioned, * * * do hereby form, enter into, and constitute themselves a copartnership. * * *" The terms and covenants which constituted the consideration are mentioned in the other paragraphs of the writing, and many of them, from the very nature of the case, were to be performed in the future.

In the sixth paragraph it is provided that each copartner should lend his labor, time, and counsel to the liquidation of the liabilities of the old firm, as well as to the disposition and realization from its assets. This covenant constituted part of the consideration as certainly as the undertaking of each partner to put into the business the specified amount of property; but it is one which could only be performed in the future. The language by which the partnership was constituted, however, was in the present tense. It clearly indicates an intention to constitute the firm from the time of signing the writing, and this intention is clearly manifested by the second paragraph, which provides that the partnership shall continue for five years from and after the signing of the articles.

We do not overlook the condition of the third paragraph, which provides that Raforth shall put into the business $20,000 in goods and merchandise which he shall first have purchased of the old firm, paying therefor to the members of said firm the sum of $10,000 in cash, and giving his note for a like amount. This provision, however, does not control the question as to the time when the partnership should begin. By it Raforth was bound to put into the business $20,000 worth of goods, which he was to purchase of the old firm, and for which he was to pay the members of that firm. The goods were in fact purchased and put into the business.

We have the right to assume this; for, as stated above, the parties at once entered upon the business, the prosecution of which the parties had in view when they signed the articles. They took possession of the stock of merchandise formerly owned by the old firm, and continued to make sales from it, and additions to it. Raforth engaged in the business, assisting in the control and management of it, and being recognized and treated by the other parties as a partner in it. That he was bound to pay the members of the firm the stipulated price for the goods cannot be questioned. But very clearly, we think, such payment was not a condition precedent to the constitution of the firm.

3. It is next claimed that there was a dissolution of the partnership, or rather a rescission of the contract of partnership, because of the failure and refusal of Raforth to pay the balance of the cash payment stipulated to be paid for the goods. The burden of establishing this claim is on the defendants; for as, by the articles, the term of existence of the partnership is fixed at five years, the presumption is that it continued at the time of the execution of the mortgages, and those who claim the contrary must establish their claim. There is some evidence tending to establish it, but we think it is not sufficient to establish it. The evidence introduced by defendants which can be considered in the question was the testimony of Haas and the widow and Frank Junkerman, son of Otto Junkerman; he having died before the institution of this suit. Haas testified that, in a conversation between him and Raforth, it was agreed that the partnership should be terminated, and that Raforth should be paid wages for his services in the business, and that he should be paid interest on the money he had put into it until such time as it could be paid out of the business; and, to some extent, he is corroborated by Frank Junkerman. Mrs. Junkerman also testified to a conversation between Raforth and her husband in which she claimed the same agreement was arrived at. Her testimony, however, is meager and of the most unsatisfactory character, consisting rather in a statement of her own conclusion from the conversation of the parties than of the language or statements of the parties. Raforth testified positively that no such agreement was ever entered into; and in addition to this is the fact that he continued in the business after the time of the alleged agreement, and up to the failure which occurred immediately after the execution of the mortgages, exercising the same authority and control in its management that he had done before, and the further fact that no credits were given him upon the books of the establishment either for his services, or the money he had paid in, or the interest thereon. Very clearly, we think, this does not overcome the presumption of the continuance of the partnership during the period fixed in the articles, or establish the fact of a dissolution or rescission of the contract.

4. Certain statements or admissions by Raforth to other parties, to the effect that the partnership had been terminated, were proven. But these admissions are not evidence of the fact as against these plaintiffs. They are admissible only for the purpose of affecting the weight or credit which should be given to his testimony. If he had not been examined as a witness, they would not have been admissible at all, and they have been considered only for the one purpose.

5. Before the death of Otto Junkerman, Raforth instituted a suit against him and Haas for the purpose of settling the business and affairs of the partnership. Junkerman's deposition was taken in that action, and his testimony tended to prove that the partnership had been terminated in December, 1882. Defendants offered that deposition in evidence on the trial of this action, and it is contained in the abstract. Plaintiffs, however, objected to its introduction. The rule, independently of statute, is that "depositions taken in another action between the same parties or their privies in estate may be read on the hearing." 3 Greenl. Ev. § 326. There is no statutory provision in this State under which the deposition in question is admissible in this action; and, very clearly, it is not admissible under the rule quoted. Plaintiffs are seeking to subject the property in question to the satisfaction of their judgments, upon the theory that Raforth was a member of the partnership at the time the mortgages were executed. But there is no privity of estate between him and them. They have no interest or estate in the property. Nor do they seek to recover any; but their object is to appropriate it, as the property of their debtor, to the satisfaction of their debts. The deposition, therefore, cannot be considered.

Under the conclusion we have reached, the money in the hands of Keine and his agent should first be applied to the satisfaction of the notes mentioned in the mortgages which bear date after the twentieth of October, 1882. There being no satisfactory evidence that those notes were given for debts of the old firm, the presumption is that they evidence indebtedness of the new. The account of $350 guaranteed by Keine will be included in this class, for it is not shown that it is a debt of the old firm. The burden on that question being on plaintiffs, Junkerman & Haas had the power, as members of the firm, and had authority to mortgage the property of the partnership for the security of those debts; the presumption being that they are the debts of the new firm.

The residue of the money, or so much as necessary, will be applied to the satisfaction of plaintiffs' judgments in the order of the garnishments. The judgment will be modified accordingly. Reversed.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACTION — Bond — Covenant — Demand. —— The words "to which payment well and truly to be made, I bind myself," etc., although attached to a condition of defeasance in a deed, constitute a sufficient covenant to support an action. No demand of payment is necessary before bringing an action on an absolute covenant to pay money.—*Douglas v. Hennessy*, S. C. R. I., 1887; 10 Atl. Rep. 583.

2. ACTION—Convict—Civil Death.——One sentenced to the penitentiary for life is not civilly dead, and can maintain an action in his own name. If his wife has made a void sale of his property, he can sue the purchaser without making his wife a party to the action.—*Willingham v. King*, S. C. Fla., Sept. 15, 1887; 2 South. Rep. 851.

3. ADMINISTRATOR—Security—Rule—Distribution.—— An administrator may be required by rule to furnish additional security, but to that proceeding cannot be joined a demand for a distribution of the estate. Such a demand must be made by an ordinary suit.—*Bloch v. Bordelion*, S. C. La., July 5, 1887; 2 South. Rep. 833.

4. APPEAL—Bill of Exceptions. —— Where there is no bill of exceptions nor brief has been filed by appellant, and no error prejudicial to him is found in the record, the judgment will be affirmed.—*Neely v. Commonwealth*, Ky. Ct. App., Sept. 10, 1887; 5 S. W. Rep. 810.

5. APPEAL—Bill of Exceptions.——When, upon appeal, it appears that the record contains no bill of exceptions showing what instructions were given or refused by the trial court, nor what evidence was produced upon the trial, it will be presumed that the judge properly instructed the jury and that the verdict was based upon sufficient evidence, and the judgment will therefore be affirmed.—*Boggs v. Commonwealth*, Ky. Ct. App., Sept. 8, 1887; 5 S. W. Rep. 507.

6. APPEAL—Bond—Securities — Justification.—— Under the statutes of Wisconsin, securities on appeal bonds must, like bail in civil actions, justify, and must be residents of the State and householders or freeholders.—*Ulrich v. Farrington, etc. Co.*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 89.

7. APPEAL—Claim and Delivery—Verdict—Judgment. ——Where, in an action of claim and delivery, the verdict of the jury is for a sum greater than the proved value of the goods, the appellate court will order a new trial, unless the parties will agree to a modification of

the judgment, making it conform to such proved value. —*North., etc. Co. v. Brathwaite*, S. C. Dak, February Term, 1887; 34 N. W. Rep. 68.

8. APPEAL — Error — Directing Verdict.—— Where, upon a trial in ejectment for five parcels of land, the court directed a verdict for the plaintiff, and, upon appeal by the defendant, the plaintiff admitted that the evidence did not authorize a judgment for two of the five parcels, it was held that judgment could not be directed for three parcels of land, but that a new trial must be ordered.—*Morse v. Stockman*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 92.

9. APPEAL—Guardian and Ward—Bond.——The statute of Wisconsin, exempting guardians from giving an appeal bond, applies to a case in which a ward has recovered from his guardian a judgment exceeding in amount the guardian bond executed by the appellant.—*Stinson v. Leary*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 63.

10. APPEAL — Judgment — Bond — Description. —— Where an appeal is taken from a judgment, and in the notice of appeal it is described as rendered on one named day, and in the bond as having been rendered on another day: *Held* that, as the record showed no judgment rendered on the day named in the notice of appeal, the appeal must be dismissed.— *Atkinson v. Chicago, etc. Co.*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 65.

11. APPEAL—Mandamus.——The statute of Alabama, which directs that an appeal from a final judgment in a *mandamus* case must be taken within thirty days after the rendition of the judgment, is imperative, and an appeal taken after the expiration of the thirty days will be dismissed.—*Gardner v. Ingram*, S. C. Ala., June 16, 1887; 2 South. Rep. 879.

12. APPEAL—Notice—Statutes.——Under the statute of Dakota, a notice of appeal must be served on the appellee, and one must also be filed with the clerk of the court: *Held*, that the filing of the notice with the clerk is not sufficient.—*Peck v. Philips*, S. C. Dak., May 20, 1887; 34 N. W. Rep. 65.

13. APPEAL—Practice.——A petition, nominally for a rehearing, but really a reargument of the case, will not be considered by the appellate court nor made a part of the record in the cause.—*Jones v. Fox*, S. C. Fla., June 15, 1887; 2 South. Rep. 853.

14. APPEAL — Referee — Report — Confirmation. —— When a referee has made a report of facts and it has been confirmed, that report becomes the finding of facts by the court, and from it no appeal can be taken. —*Bourgeois v. Schrage*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 96.

15. ARBITRATION—Award—Lease—Majority — Revocation.——A lease stipulated that the rent should be fixed by such judicious persons as might be agreed upon by the parties, but was silent as to whether the award of a majority should be obligatory. It was held that the award of a majority of the arbitrators was not binding. The power of arbitrators may be revoked by either party before award made.—*Sherman v. Cobb*, S. C. R. I., July 16, 1887; 10 Atl. Rep. 591.

16. BANKS—Banking Officers—Power of President.—— The president of a bank, without express authority from the directors, made a compromise with a debtor of the bank, and accepted a composition proposed by the debtor to his creditors. There had been ample opportunity for the president to lay the matter before the board of directors: *Held*, that the action of the president was not binding on the bank.—*Wheat v. Bank of Louisville*, Ky. Ct. App., Sept. 8, 1887; 5 S. W. Rep. 305.

17. CONFLICT OF LAWS—Exemption.——In Arkansas, the constitution prohibits a vendee from claiming an exemption of the very articles for the price of which the action is brought. One in Arkansas, who has bought chattels in Texas and removed them to Arkansas, cannot claim, in an action in that State, an exemption of such articles as accorded by the laws of Texas.—*Swangers v. Goodwin*, S. C. Ark., June 25, 1887; 5 S. W. Rep. 319.

18. CORPORATION — Privilege — Reserved Right.—— When a State grants a privilege to a corporation it reserves a right to prescribe the mode in which such privilege shall be exercised. And this reservation is implied if it is not expressed. Application of this principle to a motion for an injunction to compel defendants to receive cattle at certain yards.—*Delaware, etc. Co. v. Central, etc. Co.*, N. J. Ct. Ch., Sept. 9, 1887; 10 Atl. Rep. 490.

19. COSTS—Prevailing Party—Statute. —— The general rule that costs shall be awarded to the prevailing party, under the laws of Rhode Island, applies to proceedings under special statutes, unless otherwise provided.—*Aldrich v. City of Providence*, S. C. R. I., 1887; 10 Atl. Rep. 592.

20. COURTS—Federal Courts — State Statutes — Penalties.——A federal court has no power to enforce against a United States marshal a penalty prescribed by a State statute against sheriffs of that State who failed in a particular duty required of them by law. It is not the duty of federal courts to enforce State penal statutes.—*Lecrosy v. Story*, U. S. C. C. (N. Car.), May Term, 1887; 31 Fed. Rep. 769.

21. COURTS—Jurisdiction—Statute. —— When exclusive jurisdiction within a county is conferred by statute on a municipal court, it has jurisdiction exclusive of the circuit courts of all appeals from justices' courts. —*Plano, etc. Co. v. Racey*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 85.

22. CRIMINAL PRACTICE — Evidence — Record. —— When one is on trial for embezzling the property of a corporation, created by another State, a copy of the articles of the incorporation of such company from the office of the secretary of State of the corporation's domicile is proper and sufficient evidence to establish the existence of such corporation.—*Adams v. Commonwealth*, Ky. Ct. App., Sept. 10, 1887; 5 S. W. Rep. 310.

23. CRIMINAL PRACTICE—Evidence — Res Gestæ. —— In a trial for murder it is competent for the prosecution to prove that the homicide was committed in a bawdy house, and that the defendant kept the same. If the defense rests upon the testimony of a single witness, it is competent for the prosecution to anticipate the defense, and prove upon the direct examination of its witnesses that the statements which are to be made by the witness for the defense will be false.—*Gelson v. State*, Tex. Ct. App., June 1, 1887; 5 S. W. Rep. 314.

24. DAMAGES — Remoteness — Minor. —— Where a minor is invited by defendants to drink, gets drunk and assaults the plaintiff, he cannot recover damages from the defendants because of their unlawful act in giving the liquor to the minor. The damages were too remote. —*Scomfin v. Lowery*, S. C. Minn., Aug. 17, 1887; 34 N. W. Rep. 22.

25. DEED—Assignment for Benefit of Creditors—Priorities—Statute.——Where a deed of assignment for the benefit of creditors contained a clause recognizing the priorities and preferences recognized by law: *Held*, that the clause did not relate to preferences given by a Kentucky statute to debts due to an executor.—*McGrath v. Grinstead*, Ky. Ct. App., Sept. 10, 1887; 5 S. W. Rep. 308.

26. DEED—Blank—Homestead—Husband and Wife.— Where a husband conveys to his wife the part of his land on which the house stands, on which he had a homestead, and on the same day conveys the remainder of the land to a third person for a valuable consideration, the wife joining in the deed, that instrument is valid, although the consideration was at first left blank, and although the wife thought she was signing a mortgage.—*Queen v. Brown*, S. C. Iowa, March 14, 1887; 34 N. W. Rep. 10.

27. DECEDENT - Proceedings Relative to Distribution of Estate—Statute.——Construction of California Code relating to proceedings to settle the estate of a decedent. Ruling as to default of parties summoned by publication, and upon default and opening default.— *Hitchcock v. Superior Court*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 872.

28. DETINUE—Proof to Support—Partnership.——In detinue or the corresponding statutory action to recover specific chattels, the plaintiff cannot recover on proof of a mortgage to a partnership of which he is a member.—*Vinson v. Ardis*, S. C. Ala., May 27, 1887; 2 South. Rep. 879.

29. EJECTMENT—Rents and Profits—Improvements—Waiver.——A defendant in ejectment who had had three year's adverse possession under color of title and made improvements may, by abandoning his claim for improvements, restrict the plaintiff's demand for rent to one year's rental, but if he claims his improvements as a set-off he must meet the full demand for rent.—*Dobbs v. Harston*, S. C. Ala., July 27, 1887; 2 South. Rep. 880.

30. EQUITY PRACTICE — Process — Pro Confesso.—— The return of a *subpœna* to answer by a special deputy sheriff need not be supported by affidavit. A decree *pro confesso* for want of appearance cannot be taken upon the return day of the process, but only upon the first rule-day thereafter.—*Johnson v. Johnson*, S. C. Fla., Sept. 7, 1887; 2 South. Rep. 834.

31. EQUITY — State Claim — Lapse of Time. ——In equity, claims will be barred by lapse of time although a trust be involved, if there has been long acquiescence in the title of the other party and by lapse of time the acts of the parties have been obscured and evidence lost.—*Sanchez v. Dow*, S. C. Fla., Sept. 12, 1887; 2 South. Rep. 842.

32. EVIDENCE — Divorce —Domicile.——Declarations of intention relating to his domicile made by a petitioner for a divorce are entitled to little weight as evidence if they are not accompanied by acts of which they are explanatory.—*Gourlay v. Gourlay*, S. C. R. I., July 16, 1887; 10 Atl. Rep. 592.

33. EVIDENCE—Waters.——In an action for damages for injury to land by a dam across a stream, evidence that the dam was placed there with the consent of a former owner and partly at his expense, is incompetent if such statements were made by the former owner after he had conveyed the land, although such conveyance was in trust for himself and others.—*Warren v. Carey*, S. J. C. Mass., Sept. 22, 1887; 12 N. E. Rep. 999.

34. EXECUTION—Exemption.——Where the property of a debtor, including property fraudulently transferred by him, is of less value than the legal exemption, an execution creditor cannot reach the property so fraudulently transferred in the hands of the transferee.—*Sannoner v. King*, S. C. Ark., July 2, 1887; 5 S. W. Rep. 327.

35. FRANCHISE—Value of Evidence.——The value of a franchise, irrespective of the material upon which or by means of which it may be operated and made successful, may be proved by the opinions of persons who under like circumstances have put into operation similar franchises.—*Sullivan v. Lear*, S. C. Fla., Sept. 15, 1887; 2 South. Rep. 846.

36. FRAUDS — Statute of —— Undertaking of Third Person.——Where one who furnished material for a factory declined to furnish any more upon the proprietor's credit, and certain creditors of the factory who desired that it should continue in operation told him to continue to furnish the material and they would see him paid: *Held*, that their was an original, not a collateral undertaking, not within the statute of frauds, and they were bound to see him paid.—*Green v. Burton*, S. C. Vt., Sept. 12, 1887; 10 Atl. Rep. 575.

37. GUARANTY — Collectibility of Note—Diligence.—— The words, "I guaranty this note to be good until paid" mean that the party guarantees that the note can be collected. In an action to enforce such a guaranty, plaintiff must allege and prove that due diligence has been used to collect the note.—*Cowles v. Peck*, S. C. Err. & App. Conn., Sept. 9, 1887; 10 Atl. Rep. 569.

38. GUARDIAN AND WARD—Bond—Lease—Letters.—— Where a mother filed her bond as guardian of her minor son, which was approved and the next day made a lease of his property before the issuance of letters of guardianship, the lease was held valid.—*Whyler v. Van Tiger*, S. C. Cal., Aug. 31, 1887; 14 Pac. Rep. 846.

39. HIGHWAYS—Statute —Construction.——Construction of the statutes of Vermont relative to highways crossing railroads "at grade," and the powers of selectmen and county courts on this subject.—*Connecticut, etc. Co. v. Town of Johnsbury*, S. C. Vt., Sept. 8, 1887; 10 Atl. Rep. 573.

40. HOMESTEAD —Mortgage—Sale.——Where land on which there is a homestead is subject to a mortgage, it is competent for the court, with consent of parties, to order a sale of the whole property, if the homestead cannot be laid off without injury to the other land.—*Robinson v. Blackeny*, Ky. Ct. App., Sept. 13, 1887; 5 S. W Rep. 312.

41. INJUNCTION — Election — Remedy at Law—Equity. ——An injunction will not lie to restrain county commissioners from declaring the result of an election to remove a county seat, if the statute provides a mode of contesting the election.—*Webber v. Timlin*, S. C. Minn., July 25, 1887; 34 N. W. Rep. 29.

42. INSANITY — Commission of Lunacy — Test of Insanity—Return of Commission.—— Upon a commission of lunacy the commission should find, if the facts justify the finding, that the person examined is not "capable of managing his estate," and the return should be in the words of the commission or in equivalent terms.—N. J. Ct. Chan., Sept. 16, 1887; 10 Atl. Rep. 549.

43. INSANITY — Test of Criminal Responsibility.—— The capacity to distinguish between right and wrong as a test of criminal responsibility is no longer recognized by the more scientific and advanced authorities, medical and legal. (*Note.* This case, so far as our observation has extended, is a new departure, and the first legal recognition of the theories extensively prevalent in medical circles. ED. CENT. L. J.)—*Parsons v. State*, S. C. Ala., July 28, 1887; 2 South. Rep. 854.

44. INSTRUCTION —Duty of Court.——A trial court is not obliged at the request of either party to recite in its instruction the evidence given in favor of that party.—*Lowe v. Minneapolis, etc. Co.*, S. C. Minn., July 25, 1887; 34 N. W. Rep. 38.

45. INSURANCE—Alteration of Building.——If a policy provides that the insured building must not be enlarged, altered or improved without notice to, and consent of the insurer, otherwise the policy shall be void, any enlargement of the building is a violation of the policy and avoids it, although the risk is not increased by the enlargement.—*Frost's, etc. Works v. Millers' etc. Co.*, S. C. Minn., July 27, 1887; 34 N. W. Rep. 35.

46. INTOXICATING LIQUORS — Pleading — Certainty — Statute — Construction. —— A complaint under the Rhode Island laws, relating to intoxicating liquors, is, subject to constitutional limitations, sufficient if it follows the terms of the statute. Such a complaint is not subject to the common law rule as to certainty. Construction of Rhode Island statutes on the subject of intoxicating liquors.—*State v. Murphy*, S. C. R. I., June 11, 1887; 10 Atl. Rep. 585.

47. INTOXICATING LIQUORS—Retailing.——To constitute the offense of retailing liquors without a retailer's license it is necessary that the accused must have procured the liquor for the purpose of retailing it, or having it on hand formed the intention to retail it and carried out that intention by one sale or more. Letting a person have liquor out of kindness is not a violation of the act although money was paid for it.—*United States v. Bonham*, U. S. D. C. (S. Car.), Aug. 1, 1887; 31 Fed. Rep. 808.

48. INTOXICATING LIQUORS—Statute—Construction.—— In Iowa, it is unlawful by statute to manufacture intoxicating liquors for export. No such liquors can be manufactured and sold in that State except those which are to be used for mechanical, medical, culinary or sacramental purposes, and none other can be sold except those imported under the laws of the United States, and they only in their original packages.—*Pearson v. International, etc. Co.*, S. C. Iowa, Sept. 10, 1887; 34 N. W. Rep. 1.

49. INTOXICATING LIQUORS—Sunday—Accomplice.——Under the law of Minnesota, beer is not permitted to be sold on Sunday. The purchaser of liquor is not *particeps criminis* with the seller, and if he is in pursuit of those violating the law, that fact does not make him an accomplice.—*State v. Baden*, S. C. Minn., July 18, 1887; 34 N. W. Rep. 24.

50. JUDGMENT — Default — Joint Debtors.——Where process has been served on one of two joint debtors, the other being returned "not found," judgment by default cannot be rendered within sixty days after the return of the process.—*Stehr v. Olbermann*, N. J. Ct. Err. & App., June Term, 1887; 10 Atl. Rep. 547.

51. JUDGMENT—Laches—Deceit.——A judgment creditor who has for fifteen years failed to enforce his judgment, believing the assertions of the debtor that he had no property when by due diligence he might have ascertained the contrary, cannot after that lapse of time enforce his judgment by an action of deceit.—*Morrill v. Madden*, S. C. Minn., July 25, 1887; 34 N. W. Rep. 25.

52. JUDGMENT — Process — Alternative Service. —— Service of process by leaving a copy of it at the usual residence of the defendant, then absent from the State, will support a judgment by default in an action upon such judgment.—*Hurley v. Thomas*, S. C. Err. & App. Conn., March 25, 1887; 10 Atl. Rep. 556.

53. JURISDICTION—Presumption—Action—Use and Occupation — Damages. —— A judgment of the circuit court of the United States is presumed to be supported by jurisdiction unless the record shows the contrary. A recovery of possession in an action for use and occupation of land bars a subsequent action for damages for injuries to the same property.—*Pierce v. St. Paul, etc. Co.*, S. C. Minn., July 21, 1887; 34 N. W. Rep. 38.

54. JUROR—Challenge—Actual Bias.——Where a proposed juror has testified that he has formed an opinion as to the guilt or innocence of the prisoner, but could give him a fair trial, he cannot be asked whether such opinion was favorable or adverse.—*People v. Kunz*, S. C. Cal., Aug. 31, 1887; 14 Pac. Rep. 836.

55. LANDLORD AND TENANT—Covenant to Repair.—— A landlord who leaves part of his premises to a tenant who enters into a covenant to repair, is liable to his other tenants for a nuisance resulting from the tenant's failure to repair. His liability is not relieved by his making a new lease with the same covenant at the expiration of the term.—*Rankin v. Ingwersen*, N. J. Ct. Err. & App., March Term, 1887; 10 Atl. Rep 545.

56. LIBEL—Evidence—Witness.——If an alleged libel is expressed in ordinary language, witnesses will not be permitted to testify as to what they understood the words to mean, or that they understood it to apply to the plaintiff an offensive term found in the article.—*Gribble v. Pioneer, etc. Co.*, S. C. Minn., July 25, 1887; 34 N. W. Rep. 30.

57. LIMITATION—Joint Owners—Adverse Possession—Contract — Construction. —— Where a deed runs in terms to convey land to two grantees, and one only takes possession, the statute of limitations will not run against the other until the owner in possession manifests unmistakably his hostile intention and design to hold adversely. A contract must be construed by taking all its parts into consideration together.—*Lindley v. Groff*, S. C. Minn., July 30, 1887; 34 N. W. Rep. 26.

58. LIS PENDENS—Notice—Bona Fide Purchaser.—— In Dakota, the plaintiff in an action affecting real estate may file a notice of *lis pendens* which operates as notice to all subsequent purchasers and incumbrancers. Under this law it is *held* that such notice of *lis pendens* does not defeat a *bona fide* conveyance executed before but recorded after the filing of the *lis pendens* notice.—*Bateman v. Backus*, S. C. Dak., May 26, 1887; 34 N. W. Rep. 66.

59. MARITIME LIEN—Wharfage—Sheriff.——A lien for wharfage cannot be created except by the contract of a person authorized to pledge the vessel therefor. Hence, if a sheriff acting under an attachment from a State court takes a vessel to a wharf he creates no maritime lien on the vessel. — *Macy v. Remnants of The Mary Campbell*, U. S. C. C. (N. Y.), July 7, 1887; 31 Fed. Rep. 840.

60. MECHANIC'S LIEN—Recovery of Debt.——If in an action to enforce a mechanic's lien under the law of Dakota, the plaintiff fails to establish a valid lien, he may nevertheless recover a judgment in that action for the amount which he has been able to prove was due to him for material furnished and labor performed. —*McCormack v. Phillips*, S. C. Dak., May 26, 1887; 34 N. W. Rep. 39.

61. MORTGAGE—Mechanic's Lien—Statute — Party. —— A mortgagee of land, including a homestead and exceeding eighty acres, is not bound by a judgment rendered in enforcing a mechanic's lien, to which action he was not a party, and if the mortgagor had not selected the eighty acres which by statute might be attached to the homestead, the mortgagee upon obtaining title may do so.—*Talbut v. Barrager*, S. C. Minn., July 14, 1887; 34 N. W. Rep. 23.

62. NEGLIGENCE— Burden of Proof.——Where there is *prima facie* evidence of negligence on the part of the defendant in a damage suit, an instruction that the burden of proof is on the defendant, unless he can show that proper care was used, plaintiff can recover, is *held* erroneous. (*Quære.* ED. CENT. L. J.)—*Pugh Sound, etc. Co. v. Lawrence*, S. C. Wash. Ter., July 25, 1887; 14 Pac. Rep. 869.

63. NEGLIGENCE—Railroads—Lighted Stations— Practice.——It is the duty of a railroad company to have its stations properly lighted, and the company is liable for injuries caused by negligence in this respect, unless the party injured contributed thereto by his negligence. If an allegation of injuries is too vague the defendant may have a rule for more specific statement.—*Fordyce v. Merrill*, S. C. Ark., June 25, 1887; 5 S. W. Rep. 329.

64. NEGLIGENCE—Widow — Damages for Death.—— Although the personal representative is the proper party to sue for damages for the death of a person killed by negligence, yet, after the controversy has been settled and securities for the damages agreed upon, the widow has a right to sue for the possession of such securities.—*Schmidt v. Deegan*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 83.

65. NEW TRIAL—Witness.——A new trial will be ordered if the trial court has excluded evidence of the declarations of a witness, which evidence tends to impeach his testimony.—*Tunell v. Larson*, S. C. Minn., July 25, 1887; 34 N. W. Rep. 29.

66. NOTICE—Service by Mail—Proof of.——Where the statute requires that when service of notice by mail is permitted, the wrapper shall not have on it any direction to "return if not called for," etc., it is *held*, that the affidavit of the clerk that the notice was mailed without the obnoxious request for return, and that it was in fact never returned, is sufficient proof of the service of the notice.—*Stacey v. Jefferson Co.*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 87.

67. PLEADING—Amendment.——An amendment by which the Christian name of the plaintiff is inserted in the complaint in lieu of the initial letters of his name is properly allowed.—*Beggs v. Wellman*, S. C. Ala., June 14, 1887; 2 South. Rep. 877.

68. PLEADING—Fraudulent Conveyance. —— Where, in an action to enforce a vendor's lien, defendant pleaded that the conveyance was made to defraud the vendor's creditors, and as the plaintiff made no objection to the plea, it was held that, upon adequate evidence of the alleged fraud, the trial court was right in holding the conveyance fraudulent.—*Reese v. Kinkead*, S. C. Nev., Sept. 10, 1887; 14 Pac. Rep. 871.

69. PRACTICE—Evidence—Province of Jury—Instruction.——Where the evidence tends to show that the plaintiff was in possession of the land in controversy, and also tends to show a trespass upon it, a charge in favor of defendant is properly refused, as it would be an infringement of the rights of the jury.—*DePoister v. Gilmer*, S. C. Ala., June 15, 1887: 2 South. Rep. 878.

70. PRESUMPTION—Bills of Exceptions.——It is a rule

of law that all presumptions are to be made in favor of the decisions of courts. Bills of exceptions must contain all the evidence that was considered by the court below on the trial of the cause; otherwise it will be presumed upon appeal that the finding of the court below as to the facts was correct.—*Aspinwall v. Sabin*, S. C. Neb., Sept. 21, 1887; 34 N. W. Rep. 72.

71. RAILROAD—Eminent Domain—Statute — Construction.——Construction of the statutes of Nebraska prescribing the mode of assessing damages to the owners of real estate condemned, under the right of eminent domain to the use of railroad companies.—*Nebraska, etc. Co. v. Storer*, S. C. Neb., Sept. 21, 1887; 34 N. W. Rep. 69.

72. REMOVAL OF CAUSES—Affidavit—Prejudice — Local Influence.——When an application for the removal of a cause from a State to a federal court is made by a natural person, he must, personally, make the affidavit respecting prejudice and local influence. The affidavit cannot lawfully be made by his agent or attorney.—*Duff v. Duff*, U. S C. C. (Cal.), Aug. 1, 1887; 31 Fed. Rep. 772.

73. SET-OFF—Partnership.—— Where a partnership agrees that a note due by a third party to one partner shall be received in settlement of a debt due by the partnership to the maker of the note, such debt by the partnership may be used as a set-off against the note in the hands of a third person and assigned to him after maturity.—*McDonald v. Mackenzie*, S. C. Oreg., May 24, 1887; 14 Pac. Rep. 866.

74. TAXATION—Tax-title—Equity — Statutes.—— When, in ejectment, the title of the plaintiff rests on a decree of a court of equity in proceedings to enforce the payment of delinquent taxes, the validity of the decree may be assailed on the ground of fraud or unconstitutionality. Construction of Arkansas statutes relating to taxes and tax-titles.—*Williamson v. Mimms*, S. C. Ark., July 11, 1887; 5 S. W. Rep. 320.

75. TRUST—Resulting Trust—Parol Evidence. —— A resulting trust in land may be shown by parol evidence if it is full and clear.—*Lofton v. Sterrett*, S. C. Fla., Sept. 7, 1887; 2 South. Rep. 837.

76. WILL—Devise—Remainder—Release of Power.—— A testatrix devised her real estate to her husband for life, with power in him to appoint to whom it should go in fee simple at his death, and in default of such appointment to her heirs at law at his death: *Held*, that remainder vested at her death in her heirs at law, subject to be divested by the operation of the power if it should be executed, and that the tenant for life could release the power to the remaindermen or defeat it by joining with them in a conveyance to a third person.—*Grosvenor v. Bowen*, S. C. R. I., July 2, 1887; 10 Atl. Rep. 589.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 21.

A, in 1886, owned 160 acres of land in Missouri. He had four children. Three of them joined in a quit-claim deed to the fourth, before A's death, quit-claiming all their right, title and interest that they have *or might* have in the 160 acres belonging to their father. A deed, seized of the land. Would the quit-claim deed estop the heirs or their descendants from claiming any interest in the 160 acres? Cite authorities. B.

QUERIES ANSWERED.

QUERY NO. 18 [*25 Cent. L. J. 359.*]

Who is an "habitual drunkard?" as these words are used in Sess. Laws of 1883, and also in Rev. Stat. 1879, § 5462. How often must a man be drunk to come within the law? What must his condition be? Please cite authorities—from Missouri, if possible — construing and defining these words. SUBSCRIBER.

Answer. The only decisions we find in Missouri are in relation to the divorce law, though of course rulings under the law referred to, will harmonize with these. The drunkenness must proceed from alcoholic stimulants and not from the use of opiates. Dawson v. Dawson, 23 Mo. App. 169. The drunkenness must exist as a habit, and frequent and regular recurrence of excessive indulgence in intoxicating drink constitutes the habit. Golding v. Golding, 6 Mo. App. 602. A compilation of authorities on the subject may be found in the note to Northwestern M. L. I. Co. v. Muskegon Nat. Bank, 25 Cent. L. Journal 300.

QUERY NO. 19 [*25 Cent. L. J. 359*].

B absconds, leaving an account due W. B leaves a wife and children. W sues on the account, gets judgment against B. The constable levies upon two horses, wagon, and harness, which is all the property B had; the same is sold by the constable. Can Mrs. B maintain an action in her own name for the conversion of the exempt property? Does the constable lay himself liable to criminal prosecution under § 207, of the crimes act, Rev. Stat. of Kan., 1885, he knowing the property to be exempt? F.

Answer. The wife can cause the suit to be brought in the name of her husband. Fisher v. Conway, 21 Kan. 18. The mere fact that he has absconded does not authorize her to sue in her own name. The question, whether she can sue in her own name, because he has left her destitute, is suggested, but not decided. Spurgeon v. Spurgeon, 32 Kan. 171. It is safer to sue in his name. It is the constable's duty to make the levy (Thompson on Hom. & Ex. § 280), and it is generally held that the claimant must claim the exemption. *Idem*, § 820. If the officer acts in good faith, he is not criminally liable. State v. Tatom, 69 N. C. 35. The only cases we find holding him criminally liable are under special laws relating to the subject. Thompson on Hom. & Ex. § 852. Since the question of exemption is generally a matter of fact, it must be an extreme case which would in such matters hold him guilty of wilful and malicious misconduct. Comp. Laws Kan., 1885 (Dassler), p. 531, § 207. A. J. L.

QUERY NO. 20 [*25 Cent. L. J. 359.*]

A obtains a judgment against B, and B appeals to appellate court where judgment is affirmed. A then sues B and his sureties on the appeal bond and sureties pay part of the judgment on the said bond and B paid part. B, after original judgment, conveyed all his real estate to his wife, but kept sufficient personal property to pay his debts and the original judgment, and at all times was solvent. B's sureties now file a bill in equity to set aside the deed from B to his wife and be subrogated to the rights of A under original judgment. No execution had been issued on original judgment nor on the affirmance of said judgment within one year of each. Are the sureties entitled to such subrogation? If so, can the sureties maintain such a bill if B at all times was solvent? Was the original judgment or its affirmance ever a lien on B's real estate, no execution having been issued on either of them? Please cite all authorities, and especially any in Illinois. G. & F.

Answer. Though there is some vagueness in the matter, we consider the decisions to maintain, that the original judgment was never a lien. Curtis v. Root, 28 Ill. 367; Oakes v. Williams, 107 Ill. 154. We find no Illinois decision on the right of subrogation in such a case. The authorities are at conflict on the right of subrogation, though we believe the better opinion to be, that there is no such right in this case. 1 Story's Eq. § 499*b*; Brandt on Sur. & Guar. §§ 270-272; 5 Wait's Act. & Def. 217, 218. We do not think that B's deed to his wife can be upheld. To maintain the deed, he must have left ample property unincumbered, and must not have materially lessened the prospect of payment (Emerson v. Bemis, 69 Ill. 537), which can hardly be claimed in this case. If the sureties can use the original judgment, or after obtaining a judgment and issuing execution, they can file the bill and have the deed from B to his wife set aside. Bennett v. Stout, 98 Ill. 47. L. R.

RECENT PUBLICATIONS.

THE LAW APPERTAINING TO JURIES AND INSTRUCTIONS THERETO. Applicable to those States having Codes Similar to the Indiana Code, the Instructions Being Applicable to any State having all been Approved by the Supreme Court of Indiana. By W. W. Thornton, Author of Statutory Construction and Citations. Indianapolis: The Bowen-Merrill Co., Law Publishers. 1887.

This is a very handsome volume, well gotten up in every respect, the subject of which is the law appertaining to juries. The institution of which it treats is as old as the common law itself, and, in spite of innovation, will probably last as long as any shred of the venerable system of which it is an integral part shall endure.

The author of this work needs no introduction to the readers of the CENTRAL LAW JOURNAL. He is well known to them as a frequent contributor to our columnes, and there are few of them who have failed to profit by his ability, learning, and diligent, laborious, and accurate research. The book, however, does not require the adventitious aid of personal or professional prepossession. It can well afford to speak for itself and stand upon its own footing. It bears upon every page unmistakable *indicia* of careful, thorough, and accurate research, which should inspire confidence and secure approval.

It is noteworthy that especial attention has been paid to the important subject of the powers and duties of grand juries. The arrangement both in substance and form is very good, and as a good index is appended, the whole arrangement of the book leaves nothing to be desired.

The book is divided into two parts; the first is the treatise proper, the second is a compilation of "instructions to juries," alphabetically arranged, occupying a space equivalent to a third of that devoted to the treatise. We think much less space should have been given to this division of the work, especially as they are taken from the reports of a single State, Indiana. Perhaps, however, as these instructions embody a good deal of sound law, and as the work is especially adapted to use in States having codes similar to that of Indiana, the blemish is more apparent than real. We feel safe in commending the work as one of real merit to the profession generally, and especially in those States with reference to the codes of which it was particularly prepared.

JETSAM AND FLOTSAM.

HORSEY OR HOSS-Y.—In Falstaff's time "horse" was an appellation of reproach. "An it be not true" he asseverated in verification of one of his enormous lies, "buffet me, and call me 'horse.'"

But we have changed all that in these latter days together with worse fashions, and now "old horse" is in certain (not very refined) circles a term affectionate *cameraderie*. Now and then an effort is made to place upon the horse the burden of a ponderous legal joke. Thus, there was a lawsuit of which the subject-matter was the soundness of a horse and the name of a horse and the name of plaintiff's counsel was Hoss, and the defendant's attorney was also named Hoss, and the whole litigation was of a distinctly stable character, and somebody whose name presumably was *not* Hoss, tried to poke fun at the whole hos-sey proceeding but was rebuked by the court in the following dignified language. "He was attempting to make a joke of a solemn legal proceeding and looking rather for a trap of error in which to catch the court, that to vindicate any material legal right. This court will not spring the trigger for him."

UNITY OF ADVOCATE AND CLIENT.—It is told that the Scotch advocate, Henry Erskine, defending a lady named Tickell, commenced his address by saying: "Tickell, my client, my lord"—"Tickell her yourself, Harry," interrupted the judge, "you are as able to do it as I am." A ludicrous illustration of the proneness often shown by counsel to thus identify themselves with their clients has just been contributed in the course of hearing a breach of promise case at the Liverpool Assizes. The plaintiff, described as "an attractive looking widow of about thirty-five," brought an action against a local licensed victualler named William Henry Veevers to recover damages, and was awarded £80. The plaintiff was represented by Mr. Segar, who observed in the course of his opening statement: "Our case is that for a considerable time, since the end of 1885, the defendant has been courting us." This extraordinary attribution of affection to the defendant elicited from Mr. Justice Wills the query—"Are you and the solicitor, then, coming into the courtship?" After this illustration of counsel's identification with client, there is no longer occasion to doubt the veracity of the anecdote about the conscientious barrister appealing to the judge, on behalf of a woman just found guilty of murder, in the startling words—"My lord, we are on the point of becoming a mother."

CORPORAL PUNISHMENT.—In the "good old times" when the whipping post, branding iron and pillory were regarded as essential adjuncts to the due administration of justice, a certain graceless wight named Tom—— (we omit his patronymic from respect to his memory) fell under grave suspicion of petty larceny. So serious was the suspicion that he was actually indicted, and the indictment gravely charged that the said Tom, not having the fear of God before his eyes and being instigated by the devil, did steal, take, and carry away a certain young hog, pig, or shote, the property, *etc.*, of the value, *etc.* Tom was duly incarcerated and soon thereafter the court convened.

One day, soon after the term of the court commenced, one of Tom's neighbors met him trudging briskly along on his homeward way.

"Hello! Tom," said he, "was you cleared?"

"Oh yes!" replied Tom, jubilantly; "Oh yes! *whipped and cleared.*"